125-347

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884~~6~~.

No. ~~1081~~. 696-386 105

D. H. WILLIAMS, PLAINTIFF IN ERROR,

vs.

EDWARD D. CONGER, W. H. SMITH, W. C. TALBERT, THOMAS HARRISON, JAMES SADLER, HENRY E. CONGER, FOR HIMSELF AND AS EXECUTOR AND GUARDIAN, MARY A. CONGER, P. McCORMICK, CHARLES C. CONGER, RALPH E. CONGER AND NEWTON A. CONGER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 15, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1081.

D. H. WILLIAMS, PLAINTIFF IN ERROR,

vs.

EDWARD D. CONGER, W. H. SMITH, W. C. TALBERT, THOMAS HARRISON, JAMES SADLER, HENRY E. CONGER, FOR HIMSELF AND AS EXECUTOR AND GUARDIAN, MARY A. CONGER, P. McCORMICK, CHARLES C. CONGER, RALPH E. CONGER AND NEWTON A. CONGER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

INDEX.

	Original.	Print.
First amended original petition	1	1
Answer	4	3
Amended answer	4	3
Further answer	5	3
Verdict	6	4
Judgment	6	4
Order as to bill of exceptions	7	5
Bill of exceptions	8	5
First exception	10	8
Translation from records of General Land Office	10	8
1st—Purported application of Rabago	10	8
2d—Concession of Governor Viesca	11	9
3d—Application for possession	12	10

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
4th—Order for survey	12	10
5th—Field notes	13	10
6th—Plat of Rabago grant	14	11
7th—Order for patent	15	11
8th—Patent	16	12
9th—Testimony of Jose M. Musquiz	18	13
10th— " " Estaban Portilla	19	15
11th— " " Gov. E. M. Pease	26	16
12th— " " Andrew Neil	21	17
13th— " " John Willett	22	18
14th— " " Interpreter—Bee—(in part)	22	18
16th—Purported original petition of Rabago, and concession of Gov. Viesca	23	19
17th—Translation of the above, application and concession	25	20
18th—Testimony of Antonio G. Corrillo	28	21
19th— " " Romon L. Flores	29	22
Second exception	30	23
Third exception	31	24
Fourth exception	32	25
Testimony of William H. Williams	32	25
M. E. Kleberg	33	26
Geo. L. Hammekin (in part)	33	27
"Hammekin copy" letter power from Rabago to Blanco	35	27
Translation of above named letter power	37	28
Further testimony of Geo. L. Hammekin	38	29
Testimony of John N. Rose	39	30
Geo. B. Erath	39	30
John McCann	40	32
Gen. Thomas Harrison	41	32
Further testimony of Geo. L. Hammekin	42	33
Testimony of E. D. Conger	42	34
Purported original letter power from Rabago to Blanco	44	35
Translation of the above named letter power	45	35
Fifth exception	47	37
Sixth exception	48	37
Charge of the court in full	49	38
Seventh exception	53	42
Eighth exception	53	43
Further testimony of Geo. L. Hammekin	53	44
Charge asked by plaintiff and refused	55	44
Ninth exception	55	44
Testimony of Cracinca Landgrave	55	45
Further testimony of Geo. L. Hammekin	56	46
Translation of purported deed from Rabago to Blanco, to Laguerenne	58	46
Translation of purported power from Laguerenne to Priolland	62	50
Charge asked by plaintiff and refused	65	53
Tenth exception	66	54
Further testimony of Geo. L. Hammekin	66	54
Charge asked by plaintiff and refused	67	55

	Original.	Print.
Eleventh exception	68	55
Agreement of counsel as to bill of exceptions	69	56
Judge's certificate to bill of exceptions	69	56
Bond	70	57
Clerk's certificate	71	57
Writ of error	72	58
Citation	73	59
Proof of service of citation	74	59
Assignment of errors	75	59

1 *Plaintiff's First Amended Original Petition. Filed April 13th, 1880.*

Suit pending in Circuit Court of United States for the Northern District of Texas, at Waco.

DAVID H. WILLIAMS *vs.* N. H. CONGER *et al.*

Now comes David H. Williams, the plaintiff in the above styled and numbered cause, and with the consent of the court first had & obtained files this his first amended original petition in lieu of his original petition filed in this cause on Sept. 11th, 1873, and alleges that plaintiff was at the institution of this suit, and now is, a resident citizen of the State of Alabama, and that defendants herein, to wit, Norman H. Conger, Edward D. Conger, Charles M. Harvey, W. H. Smith, W. C. Talbert, Thomas Harrison, and James Sadler, were, at the institution of this suit, and now are (except those who have died, hereinafter stated), resident citizens of McLennan county, in the State of Texas, which county is in the northern district of said State.

Further complaining, plaintiff says that on, to wit, 1st day of August, 1873, plaintiff was lawfully seized in his demesne as of fee, and the owner by good and valid title, and in possession of the following-described tract or parcel of land situated in the counties of McLennan and Bosque, in said northern district of the State of Texas, to wit, eleven leagues of land granted by the Republic of Mexico on the 2nd day of December, A. D. 1828, to Miguel Rabago, located on the west bank of the Brazos river, above the road leading from Nacogdoches to Bexar, and joins on the south a tract located for D'n Rafuel de Aguirre, and beginning at said Aguirre's northeast corner, which is commonly known and called Stephen F. Austin's Bosque survey, a cottonwood 10 in. in diameter on the bank of the river aforesaid, from which another cottonwood 6 in. in dia. b'rs S. 70, 30 E. at 11 varas distant; another cottonwood 8 in. in diameter bears N. 64, 30 W. at 12 $\frac{6}{10}$ varas distant for first corner; thence S. 62 W., with said Aguirre's upper line at 18,833 v'r's, arriving at said Aguirre's northeast corner, & at 4,757 v'r's further, making a total of 23,590 varas to second land-mark of this survey; thence N. 28 W. 13,750 v's, where another mound was raised for the northwest corner and third land-mark of this survey; thence N. 62 E. 18,990 v'r's to a cottonwood 10 inches in dia. on bank of said river, & to the S. 63, 15 E. 4 v'r's a cottonwood 5 in. in dia., & another 8 in. in dia., to the S. 63 E., at 4 v'r's, which
2 is N. E. corner of this land & its fourth land-mark; thence down the river aforesaid with its meanders to the place of beginning, containing two hundred and seventy-five millions of square varas, or their equivalent, eleven leagues of land.

Petitioner alleges that on the day and year last aforesaid, to wit, 1st day of August, A. D. 1873, while petitioner was so seized and possessed as aforesaid of said land, said defendants above named entered in and upon said land and premises and removed and ejected petitioner therefrom, and from thence hitherto have kept petitioner

so ejected and ousted from the same, and said defendants and the heirs and representatives of such of them as have since died as hereinafter mentioned, still hold unlawful possession thereof, and use and enjoy the rents and profits of the same, which said rents and profits petitioner avers are reasonably worth the sum of five thousand dollars per annum.

Petitioner avers that since the institution of this suit defendant, Charles M. Harvey, has died, leaving surviving him as his only heir and distributee, Mrs. Clara E. Harvey, and that before his death he disposed of his claim to the lands in controversy to Harvey E. Conger, who also resides in said McLennan county.

Petitioner further alleges that since this suit was instituted said Norman H. Conger has departed this life, leaving surviving him as his heirs-at-law, and who succeeded to whatever interest he had in the lands in controversy, Mrs. Mary A. Conger, his wife; Charles C. Conger, Mrs. Clara E. Harvey, Ralph E. Conger, and Newton A. Conger, his only children, who also reside in said McLennan county, and the latter two of whom are minors, and also left surviving him as his executors the said Harvey E. Conger, Charles C. Conger, and Mary A. Conger, who now act as such executors.

Petitioner further alleges that since the last term of this court said Mrs. Clara E. Harvey has died, leaving surviving her as her only heirs-at-law, and who succeeded to whatever interest she may have had in the lands in controversy, Mary A. Conger, her mother, and Charles C. Conger, Ralph E. Conger, and Newton A. Conger, as her brothers, and also left surviving her as her executor said Harvey E. Conger, who is now acting as such executor.

Petitioner further alleges that since the last term of this court the said Mary A. Conger has intermarried with P. McCormick, who also resides in said McLennan county.

Petitioner further alleges that all of the foregoing-named persons have been made parties defendant hereto, and have been served with process to appear and defend this suit, and that each and all of them have appeared and filed answers herein, except said minors, Ralph E. Conger and Newton A. Conger; and petitioner asks that a guardian *ad litem* be appointed to represent the interests of said minors upon the trial of this cause.

Petitioner alleges that by reason of the wrongs and injuries complained of above he has been damaged the sum of ten thousand dollars, and that said lands are reasonably worth the sum of one hundred thousand dollars.

3 Premises considered, petitioner prays upon final trial hereof that he have judgment for said lands and premises; and that he be restored to the possession thereof; that he have judgment against defendants for his damages, rents, &c., and all costs of suit, for general and special relief.

E. WILLIAMS,
HERRING, ANDERSON & KELLY,
Att'ys for Petitioner.

The foregoing petition is endorsed as follows, to wit: "No. 3. U.

S. circuit court. David H. Williams *vs.* N. H. Conger *et als.* Plaintiff's first amended original petition. This action is brought as well to try title as for damages. Herring, Anderson & Kelly, att'ys for plaintiff. Filed April 13th, 1880. J. H. Finks, clerk U. S. cir. c't.

4 *Defendants' Answer.*

Be it remembered that this cause was removed from the district court of McLennan county, State of Texas, and the transcript was filed in the United States circuit court in and for the 5th circuit and northern district of Texas, at Waco, on the 25th day of July, A. D. 1879. And said transcript is endorsed as follows, to wit: "No. 3. David H. Williams *vs.* N. H. Conger *et als.* Filed July 25th, 1879. J. H. Finks, clerk U. S. cir. c't N. D. Texas, at Waco."

Defendants' answer is endorsed as follows, to wit: "No. 2332. D. H. Williams *vs.* N. H. Conger *et als.* Answer. Filed Dece'r 11th, A. D. 1873. D. F. Davis, clerk dist. c't McLennan county, Texas, by Charles R. Beaty, dep'y."

Answer of Defendants.

DAVID H. WILLIAMS
vs.
N. H. CONGER *et al.* } No. 2332.

And now comes the defendants in the above-named case, and, for answer, say they are not guilty of the wrongs, injuries, and trespasses, or either of them, as alleged in the plaintiff's petition; and for further answer they deny all and singular the allegations of said petition.

THOMAS HARRISON,
For the Defendants.

Further answer of defendants, in part, endorsed, to wit: D. H. Williams *vs.* N. H. Conger *et als.* No. 2332. Amended answer. Filed January 7th, 1876. D. R. Gurley, clerk dist. c't McLennan Co., Texas, by Charles R. Beaty, deputy.

Amended Answer.

D. H. WILLIAMS
vs.
N. H. CONGER *et als.* } No. 2332.

5 And now comes the defendants and amend their answer by leave of the court. They say they have had and held actual, adverse, continuous, exclusive, and uninterrupted possession of the land sued for, under color of title from and under the sovereignty of the soil down to these defendants, for more than three years next before the institution of this suit; and, further answering, they have had and held like possession of said land under deeds duly recorded, cultivating, using, and enjoying the same, and paying taxes thereon, for more than five years next before the institution of this suit.

And, further answering, they say they have had and held like possession of said land, under title and color of title, for more than twenty years next before the institution of this suit, and that their said possession has been open and notorious. Wherefore they plead the statute of limitations of three, five, ten, and twenty years in bar of the plaintiff's action.

Further answer of the defendants, in part, endorsed, to wit: "No. 3. D. H. Williams *vs.* N. H. Conger *et als.* Answer of defendants to *scire facias* and replication. Filed April 9th, A. D. 1880. J. H. Finks, clerk."

In Circuit Court of U. S. for Northern District of Texas, at Waco. April Term, 1880.

D. H. WILLIAMS *vs.* N. H. CONGER *et als.* } No. 3.

Now at this term of court comes Mary A. McCormick and her husband, P. McCormick, and Charles C. Conger and Harvey E. Conger.

For further answer, if required, defendants adopt the answer of their co-defendants, heretofore filed in said cause; and for answer to said *scire facias*, these defendants deny all and singular the allegations therein contained; and of this they put themselves on the country.

THOMAS HARRISON,
JAS. C. WALKER,
Attorneys for Above-Named Defendants.

6 U. S. Circuit Court at Waco, Texas.

D. H. WILLIAMS *vs.* N. H. CONGER *et al.* } No. 3.

Verdict. Filed Ap'l 17th, 1884. *J. H. Finks, Clerk.*

In the United States Circuit Court for the Northern District of Texas, at Waco.

Verdict of the jury in the case of D. H. Williams *vs.* N. N. Conger *et al.*

We, the jury, find for defendants.

S. McKOWN, *Foreman.*

Judgment.

S. S. April 17th, A. D. 1884.

D. H. WILLIAMS *vs.* N. H. CONGER *et al.* } No. 3.

This cause being called on the 10th day of April, 1884, came the parties, both plaintiff and defendant, by their attorneys, and an-

nounced ready for trial, and thereupon came a jury of twelve good and lawful men, to wit, 1st, Wilhoit, J. W.; 2nd, Loveless, T. A.; 3rd, Metford, J. A.; 4th, Scott, E. M.; 5th, Yarbrough, R. H.; 6th, Rice, R. P.; 7th, Walton, J. T.; 8th, McKown, S.; 9th, Reed, Westley; 10th, Hunt, John D.; 11th, Smith, J. E.; 12th, Jacobs, C. F. who were selected, empanelled, and sworn according to law, & who, after hearing the pleadings and evidence adduced by the parties, the arguments of counsel, and the c[h]arge of the court, retired on
7 the 17th day of April, 1884, to consider of their verdict, and afterwards, on the same day, returned into open court the following verdict, to wit:

"We, the jury, find for the defendants.

"S. McKOWN, *Foreman.*"

It is therefore considered and adjudged by the court on this the 17th day of April, 1884, that the plaintiff take nothing by his suit, and that the defendants go hence without day, and that the said defendants do have and recover from the plaintiff all of their costs in this behalf expended, and that they have their writ of execution therefor. It is further ordered by the court that execution issue for the use of the officers of the court against each party, respectively, for the costs by them in this behalf expended.

Judgment of Court allowing Bill of Exceptions to be filed in Vacation.

S. S. April 25th, 1884.

D. H. WILLIAMS
v.
N. H. CONGER *et al.* } No. 3.

In this cause, and upon the agreement of the respective parties made in open court, it is ordered by the court that the rule or practice requiring bills of exceptions to be signed and filed during term time, and the same is hereby, suspended in this cause; and it is further ordered that the plaintiff in error, who is plaintiff in this cause, have permission to present his bills of exception to the judge who tried the cause at any time out of term, and that two weeks from this date be, and is hereby, allowed defendants in error to inspect the bills of exception of plaintiffs in error, and to prepare and submit such amendments and corrections thereof as to them may seem fit, and that at the expiration of said two weeks the defendants in error submit their corrections and amendments to counsel for plaintiff in error, to be forwarded in connection with bill of plaintiff in error to the judge presiding for allowance and signature.

8 *Bill of Exceptions. Filed June 19th*, 1884.

In the Circuit Court of the United States, in the Fifth Circuit, for the Northern District of Texas, at Waco.

D. H. WILLIAMS *vs.* N. H. CONGER *et als.*

Be it remembered that on the trial of said cause, at a stated term

of said court, holden at the city of Waco, to wit, on the first Monday in April, 1884, before the Honorable A. P. McCormick, district judge of the United States for the northern district of Texas, appointed to hold the said circuit court according to the form of the statute in such cases made and provided, the issues in said cause being joined between the parties thereto, as by the record more fully appears, came on to be tried by a jury duly empanelled and sworn for that purpose, the said trial beginning on the tenth day of April, 1884, and continuing until the 17th day of April, 1884, the plaintiff, D. H. Williams, being then and there represented by M. D. Herring, D. A. Kelley, James M. Anderson, and Eugene Williams; and the defendants, Norman H. Conger, Edward D. Conger, Charles M. Harvey, W. H. Smith, W. C. Talbert, Thomas Harrison, James Sadler, Mary A. Conger, Charles C. Conger, Clara E. Harvey, Ralph E. Conger, Newton A. Conger, P. McCormick, and Harvey E. Conger (for himself and as guardian, executor, &c.), being represented by Thomas Harrison, E. H. Graham, and George Clark; and, in the course of said trial, the said counsel for the plaintiff did take and allege sundry exceptions to the rulings as to the admission of testimony and to the charge of the court, which said exceptions are hereinafter specifically set forth.

During the said trial the following proceedings, among others, were had:

A large amount of evidence, oral and documentary, was introduced, from which it appeared—

That under the colonization law of Coahuila and Texas, of date the 24th day of March, 1825, an application was made by one Miguel Rabago to Viesca, the then governor of said State, on the 28th of November, 1828, for permission to buy eleven leagues of land; that on the 2nd day of December, 1828, said governor, in conformity with the 24th article of said law, granted such permission, in usual form of concession, signed by himself and the then secretary of State, Santiago del Valle, which latter official on the same day issued a certified copy, which the evidence of the plaintiff tends to show was delivered to the applicant, Miguel Rabago, and by him committed to the care and custody of the applicant's wife, Rosa.

The evidence of plaintiff tends further to show that the certified copy of said concession remained with said Rosa till the fall of 1833, when the same was lost or stolen, and was never again in her possession.

The evidence of the defendants tends to show that the said certified copy of said concession was not in the possession of Miguel Rabago nor his wife after the 8th day of June, 1832, at which
9 time they claim it passed into the hands of one Victor Blanco, together with a letter power of attorney under which they claim, and by virtue of which they say the said Victor Blanco was lawfully authorized to sell, and did afterwards sell, the land granted to said Miguel Rabago under and by virtue of said concession by the State of Coahuila and Texas.

Plaintiff claims this letter power of attorney to be a forgery.

After the issuance of said commission on the 3rd day of December,

1833, one Samuel May Williams, as the attorney of said Miguel Rabago, made application for an extension of the title of the said eleven leagues of land in controversy, he being in the city of Austin, Texas. This application was made to the commissioners who, at Nacogdoches, In the same State, on the 22d day of the same month issued the proper order for survey, and upon the return of the field-notes by the surveyor general on the 13th day of January, 1834, extended the final title of the eleven leagues of land to said Miguel Rabago in due form of law customary at the time, giving him four, five, and six years' time to pay it in.

On the trial plaintiff introduced evidence, which was not denied or contradicted, showing that on the 25th day of May, 1825, Miguel Rabigo married Rosa Musquiz; that they lived together as man and wife until the 24th day of September, 1848, when Miguel Rabago died, leaving as his surviving heirs his wife Rosa, and a son, Juan Jose, born on the 2nd day of December, 1837, who died on the 12th day of February, 1851, leaving as his and Miguel Rabago's sole heir Rosa Musquiz Rabago, said wife of Miguel Rabago and mother of Juan Jose Rabago.

It was further shown by plaintiff on the trial and not denied by defendants that the widow, Rosa Musquiz Rabago, on the 8th day of April, 1849, married Antonio Cortez, and lived with him as man and wife until the 23rd day of March, 1875, after the institution of this action, when Antonio Cortez died.

Plaintiff also introduced a duly executed and recorded deed dated 26th day of July, 1873, from Antonio Cortez and Rosa Musquiz Rabago Cortez, to himself, conveying the said eleven leagues of land in controversy as the heirs of said Miguel Rabago.

After the extension of the final title to Miguel Rabago on the 13th day of January, 1834, the defendants claim that said Victor Blanco, under and by virtue of power of attorney from Miguel Rabago, sold the land in the city of Mexico on the 25th day of May, 1836, to Guillermo (William) Laguerenne, by an act of sale passed before Miguel Diez de Bonilla, a notary public.

The defendants further claim that Guillermo Laguerenne on the 10th day of January, 1837, in the city of Mexico, executed before Francisco de Madriago, a notary public, a power of attorney to Francisco Priolland, a citizen of New Orleans, authorizing him to sell the said Laguerenne's land, or any part thereof, and that in pursuance of said power of attorney the said attorney, Francisco Priolland, before L. T. Caire, a notary public of the *the* city of New Orleans, on the 15th day of February, 1837, sold said eleven leagues to George L. Hammekin.

It is admitted by plaintiff that said George L. Hammekin, on the 24th day of April, 1850, sold one-half of said eleven leagues of land to William M. Goodrich, in the city of New Orleans, and on the 25th day of November, 1858, in the city of Mexico, sold the other half to Louis S. Hargous, and that on the 16th day of September, 1867, in the city of Aix-la-Chapelle, Prussia, said William M. Goodrich executed to Thomas Harrison, of Waco, Texas, a power of attorney to sell his one-half interest; and that on the 28th day of

November, 1871, said Goodrich executed a second power of attorney to said Thomas Harrison, in the city of New Orleans, authorizing him to sell said one-half interest, and that on the 2nd day of March, 1868, in the city of New York, L. S. Hargons executed to said Thomas Harrison a power of attorney authorizing him to sell the one-half interest of the said Hargous in said land.

It is further admitted by said plaintiff that the said Thomas Harrison, on the 5th day of February, 1873, by a duly executed and recorded deed, conveyed said eleven leagues of land to the defendants under said powers of, except such parts of it as had been previously sold to others.

This case was originally brought in the district court of McLennan, county, Texas. It was tried there on the — day of ——, 1876, and a verdict and judgement went for the defendants. The case was appealed to the supreme court of the State, where the judgement was reversed and cause remanded for a new trial, as will appear from the report of the case in 49 Texas, page 582, entitled David H. Williams *vs.* N. H. Conger *et al.* The case was then removed to the circuit court of the United States for the northern district of Texas, where it has since been, there being no question made as to the latter court's jurisdiction of this cause.

First Exception.

The plaintiff having given in evidence a duly certified "correct translation from the original Spanish of what purports to be the proceedings had in a purchase made by Miguel Rabago from the government of Coahuila and Texas, as contained in No. 47 of vol. 41 of the permanent records" of the general land office of Texas, to the eleven leagues of land described in plaintiff's first amended original petition, which said translated copy reads as follows, to wit:

Stamp, third denomination, two reals. Validated by the State of Coahuila and Texas for the bien-ial term of 1828 & '29.

YOUR EXCELLENCY:

Citizen Miguel Rabago, a resident of the valley of Santa Rosa, respectfully represents to your excellency, that being in need of lands for farming and stock-raising purposes, he prays your excellency that in the exercise of the powers conferred upon you by law you be pleased to authorize him to purchase eleven leagues of land on the banks of the Trinity river, in the department of Bexar, or
11 at such other point as he may consider to be more convenient and better adapted to his purposes, to be located in one body or in separate tracts. He binds himself to settle upon and cultivate said land to the purposes to which they may be adapted, within the period prescribed by the State colonization law of the 24th of March, 1825, requesting also that your excellency will allow him to make payment for the same on the terms therein designated, on which conditions he prays your excellency to grant his application, wherein he will receive grace.

Leona Vicario, November 28th, 1828.

MIGUEL RABAGO.

LEONA VICARIO, *December 2d*, 1828.

In conformity to the provisions of article 24, of the colonization law, of the 24th of March 1825, I hereby authorize the petitioner to purchase the eleven leagues of land he applies for from the public domain of the department of Texas, wherever he may select or may be most convenient for him to locate them. The commissioner who may be appointed by the excutive will put him in possession of the aforesaid leagues and will issue the respective patents thereto after having classified the quality and condition of the land for the assessment of the amount to be paid to the State by him for the same, for which payment the terms authorized in article 22 of the aforesaid colonization laws are hereby granted.

A copy of his petition and this order will be furnished to the party interested from the secretary's office as evidence of the granting of this permit, and for such purposes as may be required.

Viesca, SANTIAGO DEL VALLE,
Secretary.

Citizen Santiago del Valle, secretary of State for the State of Coahuila and Texas, do hereby certify that the foregoing copy is well and truly taken from the original on file in the archives of this office, to which reference is made.

Leona Vicario, December 2d, 1828.

(Signed) SANTIAGO DEL VALLE,
Secretary.

Upon the margin of the foregoing instruments of writing appear the following endorsements, to wit:

On the application "Application for permit," and on the order granting permit, "Permit."

Stamp third denomination two rials, treasury of the free State of Coahuila and Texas (seal) for the bien-ial term of 1830 and 1831.

Validated for the bien-ial term of 1832 and 1833.

(Signed) YBARRO.

To the Commissioner:

Citizen Samuel M. Williams, postmaster of this city, attorney for citizen Miguel Rabago, a resident of the Valley of Santa Rosa, without prejudice to his legal rights, and under all the necessary and required protests, respectfully represents that: His principal acquires the right under the colonization law, article 24, of
12 March 24th, 1825, to eleven leagues of land which he is authorized by the governor to purchase, as appears from the document issued from the office of the secretary of State, bearing date the second day of December, 1828, herewith accompanied, and praying you to be pleased to direct that patents be issued to him for eleven leagues of land on the right bank of Brazos river, adjoining and above a similar tract of land surveyed for Don Rafuel de Aguirre, within the limits of the colony of the Messrs Austin & Williams, contractors, their consent being obtained thereto; and to further direct that such other action be had in the premises as may

best subserve the interests of his principal, with the understanding that he binds himself to cultivate them in conformity with the provisions of the aforesaid law, and to comply faithfully with the other requirements of the same, to which end you will be pleased to issue the respective patents as his muniment of title.

He therefore prays you to grant this his petition, wherein he will receive grace.

City of Austin, December 3d, 1833.

(Signed) SAMUEL M. WILLIAMS.

On the margin of the foregoing instrument appears the following endorsement, to wit:

"*Application for Possession.*"

CITY OF AUSTIN, *December 3d*, 1833.

In the exercise of the authority conferred upon us in article 9 of the contract celebrated between us and the executive of the State from the 25th day of February, 1831, we approve the application of citizen Miguel Rabago for the location of eleven leagues of land within the limits of our colony as stated in his application, which has not been reduced to private property, and which are unappropriated.

(Signed) SAMUEL M. WILLIAMS,
For Himself and as Attorney for Stephen F. Austin.

Stamp, third denomination, two reals, treasury of the free State of Coahuila and Texas (seal) for the biennial term of 1830 & 1831.

Validated for the biennial term of 1832 & 1833.

(Signed) YBARRO.

NACOGDOCHES, *December 22d*, 1833.

Presented with accompanying documents and accepted as required by law. This protocol is referred to citizen Jose Ma. Carbajol, the surveyor, who will survey the eleven leagues of land applied for by the party, at the point designated, in entire conformity to law. He will return the field-notes and a plot of the survey to me, whereupon such further action will be had in the premises as may be expedient.

I hereby so direct and hereto set my hand in the presence of two witnesses according to law.

(Signed) VICENTE ALDRETE.
Attest: (Signed) JUAN J. ACOSTA.
Attest: (Signed) JOSE MA. CHIRINO.

13 On the foregoing instrument of writing there appears on the margin thereof the following endorsement, to wit:

Order for Survey.

To the Commissioners:

The land that has been surveyed to citizen Miguel Rabago pursuant to your foregoing order is located on west bank of Brazos

river, above the road leading from this city of Nacognoches to Bejar, and adjoins on the south a tract located for Don Rafuel de Aguirre, and begins at said Aguirre's northeast corner, a cottonwood ten inches in diameter, on the bank of the river aforesaid, from which another cottonwood six inches in diameter bears south seventy degrees and thirty minutes east at eleven varas distant, and another cottonwood eight inches in diameter bears north sixty-four degrees and thirty minutes west at twelve and six-tenths varas distant for the first corner; thence south sixty-two degrees west, and with the said Aguirre's upper line, at eighteen thousand eight hundred and thirty-three varas, intersected the same Aguirre's northwest corner, and at four thousand seven hundred and fifty-seven varas further, making a total of twenty-three thousand five hundred and ninety varas, raised a mound of earth for the southwest and second corner of this survey; thence north twenty-eight degrees west thirteen thousand seven hundred and fifty varas, where another mound of earth was raised for the northwest and third corner of this survey; thence north sixty-two degrees east eighteen thousand nine hundred and ninety varas to a cottonwood ten inches in diameter on the bank of the river, from where another cottonwood five inches in diameter bears south sixty-three degrees and fifteen minutes east at four varas distant, and another cottonwood eight inches in diameter bears south sixty-three degrees east at four varas distant for the northeast corner of this survey and the fourth and last corner of the same, and bounded by public domain; thence down the river aforesaid with its meanders to the place of beginning, containing two hundred and seventy-five millions of square varas, or their equivalent, eleven leagues of land, of which fifty labors classified as unirrigable farming and two hundred and twenty-five labores as grazing land, timbered with oak, cottonwood, ash, hackberry, mulberry, and mezquite. The outlines thereof are shown on the plot herewith accompanied in duplicate.

Erased: Que es un Alamo; void.

Nacogdoches, January 11th, 1834.

(Signed) JOSE M. J. CARVAJAL,
Surveyor General.

Upon the foregoing instrument of writing there appears on the margin thereof thereof the following endorsement, to wit: "Field Notes."

(Here follows diagram marked p. 14.)

15 Stamp, third denomination, two rials.

Treasury of the free State of Coahuila and Texas for the biennial term of 1830 & 1831.

Validated for the biennial term of 1832 & 1833.

[SEAL] (Signed) YBARRO.

16 NACOGDOCHES, *January 11th*, 1834.

The survey of the eleven leagues of land to citizen Miguel Rabago having been completed, the respective patent will issue thereto; and

of the maps returned in duplicate by citizen José Maria Carbajol, the surveyor, one will be attached to this protocol, and the other—both to bear my rubric—to the *testimonio* (certified copy).

I hereby do so order, and hereto set my hand with my subscribing witness, according to law.

(Signed) VICIENTE ALDRETE.

Attest: (Signed) VICIENTE CORDOVA.
Attest: (Signed) J. JUSTO DE LIENDO.

Stamp, first denomination, six dollars, treasury of the free State of Coahuila and Texas (seal) for the biennial term of 1830 & 1831. Validated for the biennial term of 1832 & 1833.

(Signed) YBARRO.

Patent.

Viciente Aldetre, commissioned by the executive of the State of Coahuila and Texas to put certain Mexicans in possession of lands authorized to be sold to them by the executive aforesaid in this department of Texas.

Whereas citizen Miguel Rabago, a resident of the valley of Santa Rosa, has been authorized by the executive of the State to purchase eleven leagues of land, as appears on the permit to that effect, dated on the second day of December, one thousand eight hundred and twenty-eight, a certified copy of which has been submitted by his attorney, citizen Samuel M. Williams, a resident of San Felipe de Austin, which copy prefaces this protocol:

In the name of the State I confer upon, grant, and put him in full and corporeal possession of eleven leagues of land on right bank of Brazos river, within the colony designated by the party, the boundaries whereof are set forth in the field-notes and plot of the survey returned by citizen José Maria Carbajol, the surveyor, the originals of which are attached to this protocol. Two leagues of the above-described land are classified as unirrigable farming, and the nine remaining as grazing land, under which classification he will make payment to the State for said land the sum of one thousand two hundred dollars, as provided in article 24 of the colonization law of the twenty-fourth of March, one thousand eight hundred and twenty-five, on the terms specified in article twenty-two of the aforesaid law, and under the penalties therein prescribed. He is notified that he will be required to construct corners of masonry at all the corners of the land within one year; that he will settle upon and cultivate the same in accordance with the requirements of said law; that he will faithfully comply with the requirements thereof, and that he will never convey the same in mortmain.

Therefore, in the exercise of the powers conferred upon me by commission, by the law, and instructions issued pursuant thereto, I issue this patent, and direct that a certified copy of all this protocol be made and delivered to the party interested, to have and to hold the eleven leagues of land so sold to him for himself, his
17 children, heirs, and assigns, or any one claiming or to claim

the same by, under, or through him or them, such being the pleasure of the State.

Given at the city of Nacogdoches, on the thirteenth day of the month of January, in the year one thousand eight hundred and thirty-four.

To which I set my hand with two subscribing witnesses according to law, and written on this paper stamped for the previous biennial term in the absence of any provided for the present term.

Interlined: Brazos, fecha; valid. Erased: dos; valid. I certify.

(Signed) VICENTE ALDRETE.

Attest: (Signed) VICENTE CORDOVA.

Attest: (Signed) J. JUSTO DE LJENDO.

(Endorsed on margin of first page:) Filed in the General Land Office by Abraham Murdock, of Mobile, Ala., on this the 7th day of June, 1875. (Signed) Rhodes Fisher, ch'f cl'k.

GENERAL LAND OFFICE, TRANSLATOR'S DEPARTMENT,
AUSTIN, *October 6th*, 1875.

The foregoing is a correct translation from the original Spanish of what purports to be the proceedings had in a purchase made by Miguel Rabago from the Government of Coahuila and Texas, as contained in No. 47, of vol. 41, of the permanent records of this office.

DAVID V. WHITING,
Spanish Translator.

STATE OF TEXAS, GENERAL LAND OFFICE,
AUSTIN, *October 6th*, 1875.

I, J. J. Groos, commissioner of the general land office of the State of Texas, do hereby certify that David V. Whiting whose signature is subscribed to the foregoing certificate, is the Spanish translator of this office, duly qualified according to law, and that his official acts as such translator are entitled to full faith and credit.

In testimony whereof, I hereto set my hand, and cause the impress of the seal of the general land office to be stamped on the day and date last above stated.

[SEAL.] J. J. GROOS,
Commissioner.

(On the back of this instrument of writing appears the following endorsements, to wit:) "Filed Ap'l 19th, 1880. J. H. Finks, clerk. And also Herring, Anderson & Kelley; and in red letters, Fee, $10.50."

And having introduced evidence of the marriage of Miguel Rabago with Rosa Musquiz, the birth of their child Juan Jose, the death of Miguel Rabago in 1848, the marriage of his widow to Antonio Cortez in 1849, the death of Juan Jose in 1851, and having introduced deed of Antonio Cortez and wife, dated 26th July,
18 1873, to said eleven leagues of land, and the defendants having admitted being in possession of said land at the date of

filing the action for the trial of the right of property by this action of trespass to try title, closed the testimony for the plaintiff.

Whereupon the defendants introduce the deposition of JOSE M. MUSQUIZ taken in the city of Saltillo, Mexico, on the 9th day of August, 1881, before Jno. D. Carothers, U. S. consul.

The witness testified:

I live in Saltillo, the capital of Coahuila, and held an official position; I am secretary of State, and was judge of the supreme court of the State; I have been secretary since December 15th, 1880, and was judge of the supreme court in 1877. The old papers, records, protocols, archives, &c., pertaining to land and land grants in the territory now known as the State of Texas, still remaining in Mexico, are kept in the office of archives, and in the official custody of the secretary of State, and I have custody and control of them. By the laws of the State, and especially the law regulating the office passed February 16, 1870, these records are in my custody and control. My duties are a general supervision, and I authorize all copies that are given of documents, &c. I have seen among these papers, records, and protocols what is, or purported to be, a petition or application by Miguel Rabago, for the concession in sale to him, or purchase by him, of eleven leagues of land in Texas under the colonization law of 1825, and it is now before me. I saw it about January, 1881. My attention was called to it by John Willet, asking me to have it looked up, and I did so about the last of January, 1881. It was found in the room where the archives are kept. The room is used for depositing all documents pertaining to the executive power of the State, and it is where such papers are lawfully kept. I know the concession was deposited at the time the application was made, because it has the proper seal that the law required at that time, and I know by the file mark. It was an archive in the proper office of archives. For identification I write my name and Saltillo, Aug. 9, 1881, on the margin of it, and attach it to my answers. I do not know whether there are any other documents signed by Miguel Rabago. I could only know by looking through the archives.

On cross-examination in said deposition the witness, Jose M. Musquiz, testified:

I am 36 years old and a lawyer. Saltillo has been the capital and the seat of government most of the time since 1824. It was changed to Monclova in 1833, to Monterey in 1857, and was there until 1868. I don't know how many Governors and secretaries of State Coahuila has had. The archives have been changed only when the Government has been changed. The archives are kept in files each year, and marked separate and distinct in proper covers, and inside are separated into months in chronological order. Before a small part of them have not been in such good order as they are now. I saw the concession for the first time last January, but not in the hands of John Willet. It was found by my order among the archives by the person in charge of them. I showed it to
19 John Willet first, because he asked the Governor to have it looked up. I have known Willet since 1875. He did not

have access to the records; he was not in my office prior to January, 1881, looking for papers or land grants. I knew him as an agent for buying goat skins.

The person in charge of the archives found the concession in a file of documents of another year, as I said before, the archives not being all regulated and in order like they are now. There are eight persons connected with the office. The concession is a public archive of my office. I permit it to be taken out by order of the Governor, who has the power to permit it, as other Governors have done before. He requiring that an authorized copy be left in the office. My order was a verbal one. It is a protocol (original) because it is the original petition of Miguel Rabago and the original concession of Governor Viesca, it having their signatures. I never saw Miguel Rabago write nor sign his name nor had any correspondence with him. I never saw Viesca nor Santiago Del Valle write nor sign their names. The paper was found by my order among the archives by the person in charge of them. No one has the right to inspect the archives, except the Governor and the secretary of state. The person in charge of them can only inspect them by order of the Governor or the secretary of State. The laws of Coahuila do not prohibit the Governor from permitting such documents from being taken out, but with condition of returning the original, for which reason Mr. Willett gave bond to return it. Leona Vicario and Saltillo are one and the same place. The capitol of the State was in Leona Vicario in 1828 & 1832.

The defendants next introduced the deposition of ESTAHAN PORTILLA, taken in Saltillo before Jno. D. Carothers, U. S. consul, on the 15th day of August, 1881.

The witness testified:

I live in Saltillo. I was in charge of the archives until the first of the present month, since December 15th, 1880. The old protocols, concerning land in Texas, are in the official custody of the secretary of State, and I had charge of them, as archivist, to look up documents and keep them in order. I have seen the document described by the last witness. I saw it first in January, 1881. My attention being called to it by John Willet asking the secretary for it. I hunted it up in January, 1881, at the instance of the secretary of State, and I found it in the room used for depositing all documents pertaining to the executive power of the State, where it should have been lawfully kept. I have written my name, &c. upon it. It was an archive in the proper place.

On cross-examination, the witness testified:

I am 25 years old, and am a law student, and practice in the courts. I was in charge of the archives from December 15th, 1880, till the first of August. My duties were to look up documents and dispatch copies, and to keep the documents in chronological order. I did not know Willett before finding the concession, nor did he have access to the archives while I was in charge of them. Willet did not find the paper, and was not in the office prior to January. It

was taken out by order of the Governor. The paper is not a copy, but a protocol, because it is the original petition of Miguel Rabago, and original concession of the Governor Viesca. I never saw Rabago, Viesca, nor Del Valle write, sign their names, nor have any correspondence with Rabago, nor either of the others. In former years the archives were not so well arranged as they are now. Willet did not pretend to have found the paper. I found it. The paper is a public archive in the office of the secretary of State. It was taken out by order of the Governor. It is original. It is not a copy. It is a protocol, because it is the original petition of Miguel Rabago, and the original concession of the Governor, Viesca. I know very well, and am familiar with the signatures of Viesca and Santiago Del Valle, and know that their signatures to the concession on said protocol are their signatures, because they are the same (or like) — all that exist in the documents in the archives of the government.

The defendants next introduced the deposition of Gov. E. M. PEASE, taken before N. S. Walton, a notary public of Austin, Texas, on the 7th day of April, 1882.

The witness testified:

I have resided in Texas since 1835; was for several months a law student in Col. Burnet's law office; afterwards secretary of the general council of the provincial government of Texas, and a short time in the army. In 1836 was a clerk in the navy and treasury department of Texas. In 1837 was comptroller of the Republic of Texas. In January, 1838, I began the practice of law, and have continued until the last four or five years. I have been a member of both houses of the Legislature and Governor. I am acquainted with the handwriting of Gov. Viesca and Secretary Del Valle, from often having seen their signatures on concessions for land, and on copies of laws of Coahuila and Texas, in the archives of the office of the alcaldes and primary judge of the municipality of Austin, at the town of San Felipe, Texas, and in the same way am acquainted with the rubrics of Viesca and Del Valle. I think I would know their signatures and rubrics. It is my belief that their signatures on the paper (referred to by the witnesses Musquiz and Portilla) are genuine, and were made by the parties by whom they purport to have been made. I have often seen their concessions in the general land office of Texas, in the books of Spanish records, at many different times since the establishment of the general land office of the republic of Texas.

To cross-interrogatories the witness E. M. PEASE, testified:

I have had no acquaintance with Viesca or Del Valle, and have never seen either of them write nor any writing acknowledged by them to be theirs, nor ever received any letters from them, but I have examined and in my practice have acted upon signatures purporting to be theirs, but do not recollect of doing so as a public officer. I went to the land office this morning (Apr. 6th, '82,) to satisfy myself, and examined many concessions with the signatures

of said parties. This examination did not change my conclusion formed yesterday. I have made no other examination for many years of these signatures than those herein stated. I examined the signatures on yesterday (the 5th), and formed my conclu-
21 sions as to their genuineness then. Writings and signatures purporting to have been made by Viesca and Del Valle have often come under my inspection and examination in the practice of my profession as a lawyer, and have in the practice of my profession acted on them for the past forty years, but I cannot say how often. I have often given professional opinions on the validity of concessions purporting to be signed by said parties, but it was many years ago, and I cannot say on what concessions from memory.

The defendants next introduced the deposition of ANDREW NEILL, taken before N. S. Walton, a notary public of the city of Austin, Texas, on 7th April, 1882.

The witness testified:

I have resided in Texas nearly forty-six years, having come to Texas in 1836 as captain of a volunteer company, and engaged in the war of independence; after which I practiced law till a few years past, during the time being clerk of the court, county judge, district attorney, &c.; I am familiar with the handwriting of Viesca and Del Valle; I have often seen and observed their rubrics, but cannot be positive as to these; I believe I would know the signature of either; I have been engaged with the courts since the organization of the courts of the Republic, and have become familiar with the signatures of Viesca and Del Valle, from inspecting laws and records bearing their signatures, and have received assistance and instructions from an old officer familiar with their signatures; I never saw either of them write, nor ever received letters from them. I have examined the document (referred to by witness Pease) and find the same signed by Viesca and Del Valle with their genuine rubrics; to the best of my recollection and belief the signatures are genuine and original; I do recognize the rubrics as familiar, and they are the true signatures and rubrics of Viesca and Del Valle; In 1838 I went to San Antonio and assisted the various officers and courts in opening their books and keeping their records; was employed in the office of the clerk of the county court in which were the archives of the political chief of the department of Bexar of the old State of Coahuila and Texas; I wrote in the office, examined, assorted, and arranged the old files, papers, and documents; studied the language and the laws of Coahuila and Texas, in the course of which I became acquainted and familiar with the signatures and writings of Viesca and Santiago Del Valle and other officers, and paid attention to their rubrics also.

On cross-examination he said:

That many writings and signatures of Viesca and Del Valle have passed through my hands in the course of business, and I have acted on them as such on many occasions; many of them related to laws as enacted and certified, and others related to titles to lands,

but cannot now give the times when an action — taken on them; papers bearing these signatures have been admitted in evidence in the courts in which I did business, and I have seen many of these signatures in the general land office.

The defendant next introduced the deposition of JOHN WILLET, taken before A. McFarland, clerk of the district court of Kerr
22 county, Texas, on the 7th day of September, 1881.

The witness testified:

I know plaintiff, but not the defendants to this cause. I resided many years in Saltillo; and from 1870 to 1876 engaged there in exporting goat-skins.

The old archives pertaining to land grants in Texas are kept by Jose M. Musquiz, secretary of State, in the capitol at Saltillo. I was employed by E. H. Graham to get a photograph copy of the original grant of certain lands in Texas made by the Governor of Coahuila and Texas to Miguel Rabago, on the 28th day of November, 1828. The grant referred to was given to me by order of Jose M. Musquiz. It was in a room of the capitol building, and was given to me by the courtesy of the Governor of Coahuila, E. Madero, and the secretary, Jose M. Musquiz. I got it in January, 1881, and had it photographed (the signature) and carried it back. I got it again in April, 1881, and left a bond for its return to the State government. I mailed it at Saltillo to E. H. Graham at Waco, Texas. I last saw the paper in his possession in San Antonio in June or July, 1881.

To the cross-interrogatories the witness, JOHN WILLET, testified:

I was offered and have received five hundred dollars for the finding the paper. The first time I saw the paper it was on a table in the office, and Jose M. Musquiz and the clerk were present. I am 55 years old.

It was in evidence that Miguel Rabago was in Saltillo in person when the original concession was granted, and brought the testimony (or copy) of it home.

The interpreter Bee testified that said application and concession in said certified copy of plaintiff's title is a good translation of the application and concession contained in said protocol.

After the protocol of the application and concession inserted below was admitted in evidence as a part of the plaintiff's title, the evidence inserted in the bills of exception Nos. 2, 3, & 4, which follows, was introduced, and the same is here referred to and made a part hereof.

The defendants next offered in evidence as a part of their title on the above evidence the purported application of Miguel Rabago to the governor of Coahuila and Texas for permission to buy eleven leagues of land, and the concession of Viesca, signed by Del Valle, purporting to be the original grant of such permission, the application being dated Leona Vacario, November 28th, 1828, and the concession December 2nd, 1828, about which said witnesses have been testifying, of the following tenor:

23 (Seal of Coahiula and Texas.)

Solicitud de Don Miguel Rabago de once sitios de tierra en venta en Departamento de Bejar, 1° de Diz. de 1828.

Sello 3rd. Dos reales.

Habilitado por el Estado de Coahuila y Tejas para el bienio de 1828 y '29.

Ex'mo Señor:

El Ciudadano Miguel Rabago, vecino del Valle de Santa Rosa, con todo respeto a V. E. hago presente, que careciendo de terrenos para la agricultura y cria de ganados suplico a V. E. que en veo de sus facultades se sirva concederme en venta once sitios de tierre en las margenes del Rio Trinidad en el Departam'te de Bejar o en el paraje que me parerca mas conveniente y adaptable a mis intereses bien sea todos puntos en distintos parajes, of reciendo poblar y cultivar dichas tierras para lo que fueren aproposito deneso del termino que señala la ley de Colonizacion del Estado de 24 de Marzo de 1825. Esperando igualmente que para la satisfacion de su importe se digne V. E. Concederme los plazos que ella misma designa y en cuyos terminos A. V. E. pidó se sirva deferir a mi solicitud en que recibire gracia.

Leona Vicario, 28 de Noviembre de 1828.

MIGUEL RABAGO (rubric).

24 Leona Vicario, 2 *Diz'e de* 1828.

Conforme al art'o 24 de la ley de colonizacion de 24 de Marzo de 1825, otorgo en venta al suplicante los once sitios de tierra q. solicita en los terrenos valdios del Departam'to de Tejas en la parte q. señala o en el paraje q. mas le acomode. El comisionado q. nombrare el Gob'no lo metera en posesion de dichos sitios y expedira los titulos correspondientes certificando previam'te la clase y calidad de dichos terrenos para el senalamiento de lo q. deve satisfacer p. ellos al Estado p'a cuyo pago le concedo los plazos q. designa el art'o 22 de la referida ley de colonizacion. Dese p. la secretaria copia al interesado de su peticion y este decreto p'a su constancia y efectos consiguientes.

VIESCA, (rubric).
SANTIAGO DEL VALLE, *S'rio*, (rubric).

(Endorsements and Certificates.)

E. M. PEASE.
Saltillo, Agosta 9 de 1881.
JOSE M. MUSQUIZ.

A. NEILL.
Saltillo, Agosta 9 de 1881.
ESTEBAN L. PORTILLA.

(Seal of Government of Coahuila & Zaragoza.) El C'o. Lic. Jose M'a Musquiz, Secretario de Gobierno de Estado de Coahuila de Zaragoza, certifico que el adjunto documentos es el original que existe en el archivos del Gobierno relativos a la consecion de once sitios de

tierra hecha al D'n Miguel Rabago, en el Departmento de
25 Bejar, el 2 de Diciembre de mil ochocientes veinte y ocho.
Ya pedimento del interesado se facilita dichos documentos con obligacion de devolverlo terminado el judicio en que debe presentarlo.

Saltillo, Abril seis de mil ochocientos ochenta y uno.

JOSE M. MUSQUIZ, *S'rio*, (rubric).

CONSULATE OF THE UNITED STATES OF AMERICA AT SALTILLO,
STATE OF COAHUILA, REPUBLIC OF MEXICO.

I, John D. Carothers, consul of the United States of America for Saltillo and the dependencies thereof, do hereby certify that Jose M. Musquis is, and when he signed the annexed and foregoing certificate, dated the sixth day of April, A. D. 1881, was, secretary of State of the State of Coahuila and Republic aforesaid; that his signature attached to said certificate is his true and genuine signature, the same used by him in all his acts as such secretary, and as such is entitled to full faith and credit.

Given under my hand officially and seal of office, this 6th day of April, A. D. 1881.

[SEAL.] J. D. CAROTHERS.

Translation.

(Seal of Coahuila and Texas.)

Petition of Don Miguel Rabago for the purchase of eleven leagues of land in the department of Bexar. December 1st, 1828.

3rd seal. Two reals. Issued by the State of Coahuila and Texas for the years 1828 and 1829.

26 MOST EXCELLENT SIR: The citizen, Miguel Rabago, resident of the valley of Santa Rosa, with due respect represents to you that needing land for agricultural and raising of stock, he begs you that by virtue of your authority you will be pleased to sell him eleven leagues of land on the margins of the Trinity river in the department of Bexar, or in the section which shall appear to me to be most convenient and best adapted to my interests, being all together or in different localities, offering to settle and cultivate said lands within the time prescribed by the colonization laws of the State of the 24th of March, 1825. Also that you will be pleased to grant me the time designated by the said law to pay the dues on the said land. I ask your excellency that you will be pleased to refer my petition, for which I will be thankful.

Leona Vicario, 28th of November, 1828.

(Signed) MIGUEL RABAGO.

LEONA VICARIO, *2nd of Dec'r*, 1828.

Conformable to article 24 of the colonization laws of the 24th of March, 1825, I sell to the petitioner the eleven leagues of land he asks for of the vacant lands in the department of Texas, in the part he may point out, or in the locality most suitable to him. The commissioner whom the government will appoint will place him in

possession of said leagues, and will extend the necessary titles, previously classifying the class and quality of said lands as a guide of the amount to be paid to satisfy the government dues, for which payment I grant him the time designated by the 22nd article of said colonization law. A copy of the petition and decree will be
27 given to the party, intended for his observance and the subsequent effects.

(Signed) VIESCA.
" SANTIAGO DEL VALLE.

(Endorsements and Certificates.)

E. M. PEASE.
Saltillo, August 9th, 1881.
(Signed) JOSE MARIA MUSQUIZ.

A. NEILL.
Saltillo, August 9th, 1881.
ESTEBAN PORTILLO.

The citizen, Licentiate Jose Ma. Musquiz, secretary of the government of Coahuila de Zaragozo, certifies that the annexed document is the original which exists in the archives of the government of Coahuila relative to the concession of eleven [leagues] of land made to Don Miguel Rabago, in the department of Bexar, on the 2nd of December, 1828. And at the request of the applicant this document is given, with the obligation of returning it when the suit in which it is to be used shall be terminated.

Saltillo, April 6th, 1881.

[SEAL.] (Signed) JOSE MA. MUSQUIZ, *Sec'ty.*

28 To the admission of the purported application and concession plaintiff's counsel objected that—

1st. That it is irrelevant and forms no part of the defendants' title.

2nd. The paper, if genuine, is an archive of a foreign government, and from public policy cannot be introduced in our courts, but only a lawfully certified and examined copy can be introduced.

3rd. The custodian shows that he holds it by virtue of a foreign law which is not properly proven.

4th. But if the paper be admitted, then it is objected to for purposes of comparison of handwriting, for which object alone it is introduced. Because—

First. It is not such a paper as was required to be signed by Rabago, and no presumption can arise that it was so signed by reason of its being an archive or ancient document.

Second. There is no evidence of the handwriting being that of Rabago.

Third. It is not admitted nor proven to be the genuine handwriting of Rabago.

Fourth. The instrument with which it is to be compared is not so old but that living witnesses to the questioned signature can be and are actually introduced.

The court overruled these objections and permitted the paper to go to the jury for all purposes, subject to be controlled by his charge as to its being a standard of comparison for the handwriting of

Miguel Rabago. To which ruling and decision of the court admitting said paper plaintiffs did then and there duly except.

In rebuttal of the evidence of the defendants as to the genuineness of the said purported petition and concession and as to its having been found in the archives, where it should have legally been deposited, the plaintiff's counsel introduced (after said petition and concession had been admitted in evidence to the jury, and after the defendants had introduced all their other evidence in chief and had close their case) the deposition of ANTONIO GARCIA CORILLO, taken before Jno. D. Carothers, U. S. consul in Saltillo, on the 15th day of March, 1882. The witness testified:

I live in Saltillo, and am a lawyer, and have been governor of Coahuila and Senator to the Senate of the U. S. of Mexico; I knew one Jesus Borego, first in Abosola in 1872, also in 1874 in Saltillo; he came looking for papers, and I ordered Ramon L. Flores to hunt the archives, who did so, and Borego, I think, helped him; I recommended that they search with care; the search was made in
29 the archives where the old papers were, and was made for papers pertaining to the Miguel Rabago grant of land in Texas; the search was made in the executive department, and was made for the papers to be used in defense of the interests of the parties; I did not search personally; the chief clerk, Ramon Flores, did it; the papers occupied a space in the wall about eight yards square, and were on wooden shelves along one side of the room.

The plaintiff next introduced in rebuttal of the defendants' evidence on the subject of the purported original concession the deposition of RAMON L. FLORES, taken before John D. Carothers, U. S. consul, on the 15th day of March, 1882. The witness testified:

I live in Saltillo, and was chief clerk of the department of the office of the secretary of State of Coahuila. I knew Jesus Borego; he is now dead. I met him in 1874. He asked for search to be made for documents relating to the concession made to the deceased, Miguel Rabago, for the purpose of regaining the land; he came for plaintiff in this cause. I searched all documents. This was in the fall of 1874. I made the search, and nobody helped me; it took me about 20 days, and I did it with the utmost care. I searched in the room of the office of the secretary of State among the files of concessions. I examined the records of 1828 and other years in which were documents. I found the original grant of land made to Miguel Rabago (not the concession, but the full title of the commissioner in 1834), and gave it to Borego. It contained the field-notes, map, &c., and was embraced in five or six leaves of paper. The search was made in all the archives, completely examining all the papers that it contained, and was not confined to the files of 1828. I made it with all the care possible, and spent 20 days, more or less, in doing it.

To the cross-interrogatories of defendants the witness FLORES testified:

Jesus Borego stayed here about three weeks. I looked for all

papers which related to the petition and concession of eleven leagues of land in Texas granted to Miguel Rabago, because the primitive document was misplaced or lost, and the plaintiff desired to get all that was in the archives to prove his right, and to clear the origin from which the title came. Mr. Severiano Mora was in charge of the archives at the time, who was invested with the official character of clerk of archives.

After the introduction of the depositions of said witnesses, Antonio Garcia Corrillo and Ramon L. Flores plaintiff's counsel again objected to the introduction of said purported application of Miguel Rabago and concession of Viesca on the further ground that it is shown not to have been an archive of the office of the secretary of State of Coahuila, and for reasons heretofore stated.

The court overruled the objection and admitted the paper, subject to be controlled by his charge.

To which ruling and decision of the court, as well as to the ruling and decision already stated, admitting said concession and purported application, counsel for plaintiff did then and there duly object and except.

Second Exception.

After the evidence already set out in plaintiff's first exception was introduced, and after the evidence set out in plaintiff's fourth exception, which follows, was introduced (both of which are here referred to and made a part of this exception), and after the following additional evidence was introduced, to wit:

1. The original testimonio of the title from the State of Coahuila and Texas to Miguel Rabago, of date January the 11th, 1834, which the act of sale from Rabago by Blanco to Laguerenne recites was delivered to the latter at the time he purchased, and which Geo. L. Hamukin testified was delivered to him when he purchased from Prioland in 1837.

2. The interpreter, Bee, testified on the stand that the petition of Rabago and the concession of Viesca, as found in said original testimonio of title, is an exact counterpart or copy of said protocol of said application and concession described in said first exception, and which Musquiz and Portilla testified was found in the archives at Saltillo. The interpreter further testified that the application of Rabago and concession of Viesca found in the first part of the translated copy of the title offered in evidence by plaintiff as a part of his title is a good translation of the said protocol of said application and concession mentioned in the last preceding paragraph.

3. It was in evidence that Miguel Rabago was in Saltillo at the time that the original concession was granted and brought the testimonio (certified copy) of it home with him.

And after said protocol of said application and concession so testified to by Musquiz and Partilla had been offered in evidence by the defendants, and admitted as a muniment of their title, and the whole case was before the jury, the plaintiff's counsel prayed the court to charge the jury as follows on the admissibility of said pro-

tocol of said application and concession, which charge reads as follows, to wit:

"EXHIBIT D."

In U. S. Circuit Court for Northern District of Texas.

DAVID H. WILLIAMS *vs.* N. H. CONGER *et als.*

APRIL 16, 1884.

The jury are instructed, at the request of the plaintiff, that a paper has been introduced by the defenda..ts purporting to be the original concession of Governor Viesca to Miguel Rabago, and that it has been commented on in the argument as containing the original signature of Miguel Rabago. In this connection you are charged that at the date of such signature the law did not require the same to be signed by Rabago, and the concession goes to you for your
31 consideration as one of the links in the chain of defendants' title, and not for the purpose of comparison of handwriting, and you will not in your deliberations consider such signature as the signature of Miguel Rabago for the purposes of comparison of handwriting.

HERRING & KELLEY,
JAMES M. ANDERSON,
EUGENE WILLIAMS,
For Plaintiff.

Refused.

A. P. McCORMICK,
U. S. Dist. Judge.

On the back of this asked-for charge appears the following endorsement, to wit:

"No. 3. David H. Williams *vs.* N. H. Conger *et als.* Charged asked for by plaintiff. Filed April 17th, 1884. J. H. Finks, clerk."

This the court refused to charge, to which ruling and decision of the court refusing to so instruct the jury plaintiff's counsel did then and there duly except.

(For the full charge of the court delivered to the jury see exception sixth, which is here referred to and made a part hereof.)

Third Exception.

Upon the evidence fully set forth in plaintiff's first, second, and fourth exceptions (contained in the record from page — to page —, which are hereby made parts hereof), the jury were instructed by the court as to said purported concession and application—

"The defendants have also offered a paper which purports to be the original application of Miguel Rabago for this concession which purports to be signed by said Rabago in person—that is, by himself, and have offered proof to the effect that this paper came from the office of the archives at Saltillo, which is the proper custody for said original application and decree, and to the effect that the signatures

of Governor Viesca and of the secretary are genuine, with proof as to the circumstances of the finding said paper, and manner [of] keeping said archives, and if you believe from the proof that said paper so offered by the defendants is as old as its date imports, that it has been preserved in the archives as the initial paper connected with this grant, you may give these circumstances the weight of direct testimony to the genuineness of said signature, and if the other proof in the case does not in your judgment overbear this weight you may find the signature to this original application to be the proved signature of Miguel Rabago, and use it as a standard of comparison to aid you in determining the genuineness of the signature to the writing purporting to be a letter power from said Rabago to Victor Blanco."

To which charge of the court the plaintiff's counsel objected for the following reasons:

32 1st. The charge is upon the weight of evidence.

2nd. It submits to the jury a question which should be decided by the court.

3rd. It submits to the jury a paper for the comparison of handwriting which is neither proven nor admitted to be genuine, nor to be signed by the genuine signature of Miguel Rabago.

To the ruling and instructions contained in said extract of said charge the counsel for plaintiff objected, and to each and every part thereof plaintiff's counsel did then and there except.

For the full text of the charge of court to the jury see exception sixth, here referred to, and made part hereof.

Fourth Exception.

Be it further remembered, that in addition to the evidence elsewhere set out in the bills of exception herewith filed, which are referred to and made part hereof, the defendants introduced the following testimony:

WM. H. WILLIAMS, in a deposition read during the trial of the cause, taken in Galveston, Texas, before Jno. Jay Harcourt, notary public, October 9, 1879, says:

I am forty-six years old, and reside in Galveston, Texas. My father, Samuel May Williams, died in 1858. I know only as a matter of history that he came to Texas in 1821, or 1822, and made it his home till his death. In the same way I know that he was the secretary of Austin's colony, and his duties such as were imposed by law. Since his death I have been the custodian of his papers. I caused them to be examined in 1876 by M. E. Kleberg, Esq., an attorney-at-law of this place, at instance of Col. Thos. M. Jack, in behalf of Gen. Thomas Harrison, of Waco. Those examined at the time were old miscellaneous papers relating to the occurrences before the year 1836, as near as I can recollect. They were in an old black leather trunk, which is probably ten or twelve years older than I am. The trunk has been in my possession since my father's death. From my earliest recollection the papers were in the trunk referred

to, and probably placed therein by my mother or father some time about the "runaway scrape." They have always been in my possession, and in the trunk since the death of my father. I remember testifying in the case at Waco in the fall of 1876, and that a paper was exhibited to me on that occasion. I only know its purport as translated, and from the memorandum in my father's handwriting on it. The paper then exhibited to me was found by M. E. Kleburg in the trunk, as he stated, on the occasion referred to above, when he examined the papers in the black leather trunk. The trunk contained papers in English, Spanish, and probably French. I paid no particular attention to them, other than the one Kleberg called my attention to, now in question. The paper had a memorandum of its nature and contents in my father's handwriting upon
33 it. (For copy of paper referred to, with endorsements and memorandum, see post, page 50.) The runaway scrape occurred in March, 1836, I believe. From my mother's statements I know she had father's papers with her during the runaway scrape. She kept them until her death, and I afterwards until now. I don't recollect father's ever having the trunk out of the house or mother's possession. It was either in father's or mother's possession until it came into mine. My earliest recollection of the trunk was in 1840, at our house in Galveston, where it remained until 1859, but it was traditionally known to me to have been with us at Sn. Phillipe de Austin, on the Brazos river, and at our home at Quintana, and afterwards at Galveston. From 1836 to 1838 my father and mother lived at Quintana, at the mouth of the Brazos river.

M. E. KLEBERG, in a deposition taken and read under same circumstances as the foregoing, says:

My residence is Galveston, Texas; I remember examining a trunk submitted to me for search of papers; it contained letters and documents, some in English and some in Spanish; some related to the private business of Sam'l May Williams, and some were letters written to him concerning lands in Texas—many of them historical and related to public affairs; the trunk was an old leather one; I received it from Judge Wm. H. Williams, and he had been requested by Col. T. M. Jack, of Galveston, at the instance of Gen. Thomas Harrison, to search through his father's old papers for a power of attorney from Miguel Rabago to Victor Blanco; that he had no time to look for it, and requested me to do so; I found such a paper as well as I remember; it was a power of attorney from Miguel Rabago to Victor Blanco, authorizing the latter to sell such lands as the former had in Texas, and to empower any other person he should appoint to make said sale. There was an endorsement on it purporting to be made by Victor Blanco to Sam'l May Williams, authorizing the latter to sell Miguel Rabago's lands in Texas. It was an old looking paper in sound condition and not mutilated in any way, containing no erasures or interlineations. I delivered said paper to Gen. Thomas Harrison. I saw it again in the fall of 1876 in Waco, during the trial of this cause in the district court of McLennan county. I was then examined in relation to it. I found

in the trunk several letters and documents signed by Victor Blanco. These I delivered to Gen. Harrison and took his receipt.

GEO. L. HAMMEKIN, in a deposition read during the trial by the defendants, and taken before N. L. Walker, notary public, of Limestone county, Texas, on the 29th day of November, 1876, says:

I purchased the eleven leagues of land in controversy about forty years ago in the city of New Orleans from Francisco Priolland, acting attorney for Guillermo (William) Laguernne. I had in my possession for a long time a paper purporting to be a copy of a power of attorney from Miguel Rabago to Victor Blanco. I have it in my possession this moment. It is dated Monclova, 8th June, 1832. I cannot state the first time I ever saw said copy, but say that
34 it was 1837 or 1838. On 31st July, 1838, I paid to the receiver of Milam county eight hundred dollars on account of twelve hundred dollars due from the purchase of said eleven leagues of land from the State of Coahuila and Texas. On the 25th of December, 1839, I paid the balance to James H. Starr, secretary of the treasury of the Republic of Texas. Guillermo Laguerenne was either a Frenchman or an American. It was sold to him on the 25th day of May, 1836. I bought of him in February, 1837, through his attorney, Francisco Priolland. I attach said power of attorney from Rabago to Blanco, to my answers, and sign my name to it to identify it.

35 Sello tercero. Dos reales. Para los años de mil ochocientos treinta y sis yochocientos treinta y siete.

MONCLOVA, ocho de Junio de mil ochocientos trienta y dos.

Señor Don VICTOR BLANCO.

Mi estimado tio y Señor: Acompaño a V. el testimonio de once sitios de tierra q'e me concedio en venta el Ex'mo Señor Governador del Estado en el Departmento de Tejas para que tenga V. la bondad de hacer cuanto estubiere de su parte paraque se tome la posesion de ellos por si, o por persona de su confianza dandole a V. el mas amplio poder paraque los cultibe los venda, cambie o enagene a su entera satisfacion pues para todo lo autorizo y estare y pasare en todo tiempo por la q'e V. hiciere y si no fuere bastante esta mi carta poder lo otorgare judicial tan luego como V. guste y mi avise necesitarlo y dispensando V. esta molestia me repito a su disposicion como su mas afecto sobrino y servidor que atento besa su mano.

MIGUEL RABAGO.

Yo, el infrascripto escribano, certifico y doy fe que la copia que antecede es igual y a litera con la carta poder que original me ha demostrado Don Victor Blanco y la misma que tube presente al extender la escritusa de Venta que en veinte y cinco de Mayo del
36 año proximo pasado de mil ochocientos treinta y seis hizo en virtud de ella a D'n Guillermo Laguerenne de once sitios de tierra situados en la Departmento de Tejas sobre la banda occidental del Rio de los Brazos arriba del Camino q'e la del Pueblo de Nacog-

doches p'a Bejar seguin conste de Registro protocolo de instrumentos publicos de mi cargo. Y para q'e conste donde comenga a podirmento del interesado doy la presente por duplicado en Mexico a diez y siete de Mayo de mil ochocientos treinta y siete, sienda testigos D. Rafael de Revilla, D'n Teafilo Carreno y Felipe de Revilla Olivares de esta vecindad.

Firmado. MIG'L DIEZ DE BONILLA.
Esn'o No'y.

No. 49. CONSULATE OF THE U. S. A., MEXICO *6th May*, 1837.

I, the undersigned, consul of the United States of America for the City of Mexico, hereby certify that the signature of Mig'l Diez de Bonilla, subscribed to the above document, is well known to me; that the said Bonilla was at the time of executing the same a duly authorized notary public of this city, and as such should be entitled to full faith and credit.

In testimony whereof I have hereunto set my hand and seal of office, in the city of Mexico, the day and year above written.

[SEAL.] (Signed) W. S. JONES.

Registered folio 68. Fees, $2.

37 *Translation.*

Third-class seal. O Two reals. For the years one thousand eight hundred thirty-six and thirty-seven.

MONCLOVA, *8th June*, 1838.

Señor DON VICTOR BLANCO.

MY ESTEEMED UNCLE AND SIR: With this I hand you (literally I accompany to you) the testimonio of eleven leagues of land which his excellency the governor of the State granted to me, a sale of in the department of Texas, in order that you may have the goodness to do whatever should be in your power, so that possession may be taken of them by yourself or by a person of your confidence, giving to you the most ample power, so that you may cultivate them, may sell them, may exchange or alienate to your entire satisfaction, because for everything I authorize you—and I will stand and I will pass in all time for that which you should do; and should this my letter power not be sufficient, I will grant judicially as soon as you please and notify me that you require it, and you excusing this trouble I place myself at your disposal as your most affectionate nephew and servant, who attentively kisses your hands,

MIGUEL RABAGO (rubric).

I, the undersigned clerk, do certify that the foregoing copy is, to the letter the same as the original power that Don Victor Blanco has presented to me, and the same that I had before me when making out the bill of sale, that on the twenty-fifth day of May,
37½ of the year one thousand eight hundred and thirty-six, made by virtue of it to Don Guillermo Lagurenne of eleven sitios of land situated in the department of Texas, on the west side of

the Brazos river, above the road that leads from the town of Nacogdoches to Bejar, as it appears in the public records in my charge. And so that this be of value wherever required, and at the request of the party interested, I issue duplicates of the present in Mexico the seventeenth day of March, one thousand eight hundred and thirty-seven, being witnesses Dn. Rafael de Revilla, Dn. Teofilo Carreno, and Dn. Felipe de Revilla Olivares, of this community.

(Signed) MIGUEL DIEZ DE BONILLA,
Notary Public.

38 Geo. L. Hammekin in a deposition taken 26th day of March, 1880, at Waco, before Thos. C. Smith, notary public, says: I have had the following title papers of the Rabago grant in my possession.

1st. Testimonio or second original issued in name of Miguel Rabago.

2. A letter of attorney from Miguel Rabago to Victor Blanco.

3. Sale by Victor Blanco as attorney for said Rabago to said Laguenenne.

4. Power of attorney from said Laguerenne to Francis Priolland.

5. Sale by said Priolland to myself.

I received the above-entitled papers from Francis Priolland in New Orleans at the time I made the purchase. I delivered them to my agent, Rob't Rose, and have not seen them since. I saw to-day the original power of attorney from Rabago to Blanco. I have seen Blanco's signature frequently before and after I left Mexico. I know Victor Blanco's signature because I have seen it on many papers having no reference to the Rabago grant. It appears on the said original power of attorney, subscribed to the transfer made to Sam'l May Williams. I believe the transfer is in Blanco's handwriting, and I know the signature is his. I had a copy of said power certified before and by Mig'l Diez de Bonilla in the city of Mexico. I also had a copy of this copy. When I purchased from Priolland in New Orleans in February, 1837, I made it a condition that a certified copy of the letter of attorney from Rabago to Blanco should be obtained from Mexico; the copy so certified (the certificate of the notary being dated 17th March, 1837) was sent to me and delivered by me to Robert Rose as above stated. A copy of this remained in my possession until I delivered it to Gen. Harrison. There is an endorsement on it in my handwriting made many years ago; I can't state when. The original testimonio of the original title was in my possession, given me by Priolland in 1837, when I purchased the land, and deposited by me in the general land office at Houston in 1873. I never saw the original sale from Blanco to Laguerenne. It forms a portion of the protocol or archives of Mexico, and was executed after I left the city of Mexico in 1836. In May, 1836, Laguerenne was a merchant in the city of Mexico. I believe the runaway scrape occurred before April 21st, 1836. Robert Rose was my agent at the date of my purchase. It was his duty to see the settlers on this land; he wrote me had been on the land. I and my vendees have exercised acts of ownership on this eleven league grant and claimed

it certainly since May, 1838, under the title shown by the title papers mentioned above, and have exercised every act of ownership which I believe necessary to establish my title:

1st. By depositing the testimonio or second original in the general land office.

2nd. By payment of $1,200.00 dues to the republic of Texas, the purchase-money which Rabago promised to pay to the State of Coahuila and Texas.

3rd. By sending an agent who compromised and rented to several settlers on this land many years ago.

4th. My vendees as well as myself have often paid taxes on said land.

39 Victor Blanco was intrusted by some of the principal men of the city of Mexico to attend to their business in the States of Coahuila and Texas, of which States at one time he was governor. He was once a senator in the Mexican Congress. I have never seen him, but have heard that he was spoken of as an honorable man in his day.

Question. Did you pay taxes on this land?

My agents attended to the land, including the payment of taxes. Subsequently my vendee also paid taxes.

Question. What did you get for the land?

A satisfactory consideration; not one dollar in cash. I had a current account with Hargons, on which this was credited. Hargons, in May, 1879, received $32,000 in American gold on these transactions. While I was in Mexico Rose rented to and compromised with settlers. I left Mexico in 1836, and returned there again in 1850.

JNO. N. ROSE, in deposition taken in Lynchburg, Va., says:

Robert Rose was my brother; he died in Washington city, D. C., on the 16th day of May, 1871. I was his administrator, and had charge of all his papers, private and professional. He was a lawyer. I have several times made thorough examination for the following papers, and failed to find them, to wit:

1st. A deed from Miguel Rabago, by Victor Blanco, attorney, to Laguerenne, conveying 11 leagues of land in Texas, lying on the west bank of the Brazos river, granted Rabago by the Mexican Government, executed in the city of Mexico May 25th, 1836, before the notary public, Mig. Diez de Bonilla.

2nd. A power of attorney from Miguel Rabago to Victor Blanco, authorizing him to take possession of and sell said land, in the form of a letter dated 8th June, 1832.

3rd. A power of attorney from Laguerenne to Francisco Priolland, authorizing him to sell the same land, executed in the city of Mexico on the 10th day of January, 1837, before the notary, Francisco de Madriago.

Maj. GEO. B. ERATH, for defendants, testified:

I have been in Texas since April, 1833. Settlement in this part of the country began in 1845. I did know Archie Hughes. He estab-

lished several eleven-league grants in this part of Texas, of which the Rabago was one. I don't remember what he did about it. I did no work for him on the Rabago grant at that time. While hunting for vacant land in 1846 I established the lines in order to keep off of this. I ran out the lines of the La Vigo grant for Hughes while he was here. Hughes and I were on the Rabago grant in 1851 or 1852. Hughes said his father was attorney for several grants, and he wanted them hunted up. I knew one Graham. He went on the Rabago grant in 1851 or 1852. I know of the Neville league. I knew London, who lived on the Rabago grant. He sold out to Cabb in 1853. Sheek, whom I also knew, lived on the grant. Hughes let Sheek have 200 acres of land to settle on if he would live there. He was to live on the land and hold it for the owner. Sheek went there since the war and remained there all the time. Isom Earle went on the London place after London left it. I lived ten or twelve miles from the London place at that time. I frequently passed the place. I don't know that I ever saw the place vacant. I have been employed by Gen. Harrison and by Green of Austin to make surveys on the land. I probably made the first partition surveys for Green. He was negotiating for Rose. I have probably made fifty small surveys for Rose, Green, and others. I began these surveys in 1853. I knew the Krouch and Neville leagues. They are on the Rabago grant. I divided them. I have frequently made small surveys on them for Gen. Harrison, till within the last nine years. About nine years ago there were settlements, churches, school-houses, mills, &c., on the Rabago eleven-league grant. I knew Billy Anderson. He lived at the mouth of Meal creek. He went on the land in 1855 or 1856, or maybe as early as 1853. Five years ago there were probably a hundred or more families on the grant, claiming under Goodrich, Hagons *et al.* Since Hughes came here, Hammekin, Hargons, and Col. Harrison have been claiming the land. I knew McKissick. He went on the land in 1850, on the McGary. There was a compromise between him and Rose. Gen. Harrison and Green were the contracting parties. Dr. Neal lived there after McKissick. I knew Dr. Bell; he lived on the Neal league, having gone on it some time before the war. He lived on the Krouch instead of the McKissick league. There were no colonists in the part of the grant where Sheek lived. I knew Bruner; he lived on the North Bosque, or near it. He first went on it as a pre-emption; afterwards Gen. Harrison made him a deed. He went there in 1853. Harrington was on it. He claimed as a colonist, and compromised for half. I knew Holman; he compromised for half. The colony titles were the junior titles. The Neal, Neville, and McKissick leagues were compromised for half. McKissick claimed under the McGhary league, Sheek under the eleven league. The latter was on it in 1850. He did not then claim under the eleven league. He, young Sheek, filed a certificate on it I heard, but this was during the war. The compromise surveys were made in 1857; many sales were made after 1857, quit-claim deeds being given. Prior to 1848 there was great trouble with Indians. After that time settlers were safe. In 1849 the Tarkawas stole some horses.

The earliest surveys for sales were made in 1857. The parties for whom partition surveys were made were already in possession. They merely remained in possession. There were sales also to other parties. Robert Rose claimed the Rabago grant, as I understand, for Hammekin, Hargons, and Goodrich. I judged from the talk of Hughes and Rose that they represented the same claim. London was on the London place in 1854, and claimed under Goodrich, Hargon, and others. This place was always occupied since 1854 or 1855 by persons claiming under this title. Old man Sheek went on a part of the grant, not covered by a colonist title, in 1853 or 1854, with the same understanding with Hughes and Harrison, to occupy it for them. No one thought eleven-league titles good until the supreme court decided the question in 1851. I never heard of the widow Robago's claim until this suit was brought. During the war I heard of some one claiming under probably a five-league claim.

Mr. McCann, for the defendants, testified:

I have lived here since 1857. I know the London place. Isam Earle lived on it. The house burned down, but the place
41 has been occupied all the while. Earle lived there in 1858 or 1859. I live five miles from there. Do not know the family who lived there after the Earles. The Earles left there during the war. The house was destroyed in 1859. There was a sheep ranche on the place, and the parties on the place at the time of the burning camped on the place. I have lived on the Rabago grant and head-right since 1857. I bought of Standifer. He had compromised with the parties Gen. Harrison represented. Never heard anything of Mrs. Rabago's claim until this suit was brought in 1873.

Gen. Thomas Harrison, in addition to the evidence concerning possession and acts of ownership, testified:

I have been living in McLennan county since I have had connection with the Rabago grant, many years. I guess I commenced with it about the year 1854 or 1855. My first connection was in a friendly way for Robert Rose, who visited me socially, and when he would leave he would give me directions in regard to the land which I carried out for him. He was acting for Hammekin, Goodrich, and Hargons I understood. I compromised with settlers and had surveys made. I paid taxes (and it is admitted that witness paid taxes from 1854 to 1859). I made quite a number of sales of land. I instituted suit in the Federal court at Austin against Cheek since the war. Several suits were brought against Hammekin in district court, McLennan county, before the war. Mr. Rose was here before 1856. Has been here two or three times since. After he first came there were constant acts of ownership over the land. I would often ride over the land and talk with the settlers about the land. Some would settle. This state of things continued for several years. All those acts were done under what was called the Hammekin title. I never heard of any adverse claim to the land until about the time of bringing this suit in 1873. In places on the land it is thickly settled.

On cross-examination the witness HARRISON testified:

I adjusted with the settlers by giving them half. The whole front of the land, except about a league, was covered with head-rights. I got the London place from London and sent Isam Earle on it. I compromised the Neville league by giving half of it. I always made quit-claim deeds until I sold to Conger in February, 1873. I did not exchange with the Congers. I took part payment in city property valued at over $4,000, and took their notes for $5,000.00. I told Mr. Conger or Mr. Harvey there were about 28,000 acres unsold. There was no original power of attorney placed in my hands. The original was not found until after this suit was brought, and was not introduced here until after the first trial. There was a suit of Bell *vs.* Hammekin. Rose had made a contract or sale to Bell, who afterwards brought suit for improvements.

Re-examined:

Nearly all the colony claims were compromised at about one-half. I don't think I made any warranty until I sold to Conger the defendants. Mr. Goodrich was over 70 years of age. He was a very old man. The price I received for the land was not a fair
42 price for the land, but there were reasons for the sale. I had, however, sold off the front and best land, as appeared after riding over the land and examining it. The power of attorney was not used until the second trial.

GEO. L. HAMMEKIN further testified by deposition taken March 29th, 1875:

That the original act of sale from Miguel Rabago by Victo Blanco to Guillermo (William) Laguerenne, of date May 25th, 1836, which was given to him by Priolland when he purchased the land in 1837, as stated in his other depositions, was executed before Miguel Diez de Bonilla, a notary public in the city of Mexico; that he knew the signature of said office, and recognized his signature to said act of sale as his genuine signature, because he had often employed the notary, Bonilla, during his residence in Mexico from 1831 to 1836; that he delivered it to Robert Rose, his attorney and agent in 1850, and he has not seen it since; that he has in his possession—

1st. A legal copy of the original testimonial of title to Rabago, followed by a petition to Judge Alltors by Guillermo Laguerenne for the same, and a certificate signed by Miguel Diez de Bonilla and the certificate of the American consul.

2nd. A simple copy of the sale from Rabago by Blanco to Laguerenne, followed by a copy of the receipt of the treasurer of the custom house of Mexico, for the alcabala (contribution or tax on sale of land) from said Laguerenne. He attaches these papers to his answers. Bonilla's certificate to first named paper is dated —, 1836, and the consul's certificate to the effect that Bonilla is a notary, and his signature to the certificate genuine, is dated June 7th, 1836, in the city of Mexico. The certificate of the consul of the U. S. to the other paper is dated in the city of Mexico on May 27th, 1836.

E. D. CONGER testified on the stand: That he is one of the defendants in this case, and was one of the purchasers from Gen. Harrison; that before they purchased they had the title examined by competent attorneys, and bought on the faith of their opinion as to the title; that they never heard of any adverse claim until the institution of this suit; that the land bought by the Congers was the remnant of the grant after the best parts of it had been sold off; that they have paid taxes on the land regularly since they have purchased it; that there were about one hundred settlements on the eleven league-, when they purchased, but none on the part they purchased.

The defendants also introduced in evidence:

1st. A certificate from the comptroller of the State showing that Robert Rose, as agent for G. L. Hammekin, rendered for taxes for the years 1854 to 1859, both inclusive, 48,700 acres of the M. Rabago grant in McLennan county, and that the records do not show that there were any other assessments made for those years.

2nd. An original lease from A. M. Hughes to William Graham to the Neville league on said grant, dated May 24th, 1854. It recites that Hughes is acting for Robert Rose, the agent for Mr. Goodrich, who claims the Rabago eleven leagues of land. Also, a transfer from said Graham to David E. London of this lease, dated October 17th, 1854.

43

3rd. A power of attorney from Geo. L. Hammekin to Robert Rose, dated May 24th, 1855, recorded in the records of McLennan county April 28th, 1857. It is a general power to prosecute, sue for, recover, and establish his claim to lands situated in different parts of Texas. To compromise with settlers, and sell.

4th. Docket of the district court of McLennan county, showing the suits about the land before the war, styled Hammekin *vs.* Graham, and Hammekin *vs* Bell.

5th. The interpreter, Bee, testified on the stand that the copy of the power of attorney which Hammekin testified above is a copy of the certified copy which he got from Mexico, when he bought the land in 1837, and which is incorporated in this bill of exceptions above is an exact copy or counterpart of the power of attorney found in Samuel May Williams' old trunk, and now offered in evidence, except in the latter the date is written "8th of June, 1832," and in the Hammekin copy "eighth of June, eighteen hundred and thirty-two," and the power found in Williams' trunk closes with these letters: "B. S. M.," which is an abbreviation for "kisses your hand." This is written out in full in the Hammekin copy.

The translated land office copy of the title offered by the plaintiff in evidence shows on its face that Samuel May Williams, as attorney of Miguel Rabago, on the 3rd day of December, 1833, presented Rabago's concession to the commissioner for extending titles in Texas, and made application for possession, title, &c., to the land in controversy, and that the final title was issued on this application.

7th. It was in evidence that Victor Blanco was the uncle by marriage of Miguel Rabago, and that they were on friendly terms.

8th. The said act of sale from Rabago by Blanco to Laguerenne recites that the sale was made under a "letter power," which the officer saw read, and returned to the party, Victor Blanco.

9th. It was in evidence that Miguel Rabago was a citizen of the State of Coahuila, in the republic of Mexico, and that he and his family lived there all of their lives.

10th. The original testimonio of the title of date January 13th, 1834, which Hammekin testifies was delivered to him by Priolland when he bought in 1837, was put in evidence by the defendants.

In connection with the depositions of Wm. H. Williams, M. E. Kleberg, Geo. L. Hammekin, and John N. Rose, and the oral testimony of witnesses George B. Erath, Thomas Harrison, Conger, and Bee, and the documentary evidence showing acts of ownership, by asserting title, by suits, and by the testimony of the witness McCann, and other evidence set out above, the defendants offered in evidence as an ancient instrument the paper found by the witness Kleberg in the old trunk in Galveston, Texas, purporting to be a letter power of attorney from Miguel Rabago to Victor Blanco to locate and sell the eleven leagues of land in question, it being of the following tenor:

44 MONC'A, 8 *de Junio*, 1832.

S'or D'n VICTOR BLANCO.

Mi estimado tio y S'or: Acompaño a V. el testimonio de once citios de tierra q. me concedio en venta el Ex'mo S'or Gov'or del Estado en el Departam'to de Tejas para que tenga V. la vondad de hacer cuanto estubiere de su parte p'a q. se torne la posesion de ellos por si o por persona de su confianza dandole a V. el mas amplio poder p'a q. los cultibe, los venda, cambie o enagene a su entera satisfacion pues para todo lo autorizo y estare y pasare en todo tiempo por la q. V. hiciere y sino fuere vastante esta mi carta poder lo otorgare judicialm'te tan luego como V. guste y mi abise necesitarlo y dispensando V. esta molestia mi repito a su disposicion como su mas afecto sabrino y servidor q. att'o B. S. M.

MIGUEL RABAGO (rubric).

(Endorsements on above.)

Fiero todos mis facultades en favor del S'or D. Samuel Williams, adm'or en corr. en la villa de S. Felipe de Austin, p'a q. a mi nombre y como mi apoderado tome la posecion en los once sitios expresados en esta.

VICTOR BLANCO (rubric).

Monc'a, 3 en' Ab'l en 1883.

D'n Miguel Rabago a D'n Victor Blanco, sobre tierra.

45 (Translation.)

MONCLOVA, *8th June*, 1832.

Señor Don VICTOR BLANCO.

MY ESTEEMED UNCLE AND SIR: With this I hand you (literally "I accompany to you") the testimonio of eleven leagues of land

which his Excellency the Governor of the State granted to me a sale of, in the department of Texas, in order that you may have the goodness to do whatever should be in your power, so that possession may be taken of them by yourself or by a person of your confidence, giving to you the most ample power so that you may cultivate them, may sell them, may exchange or alienate to your entire satisfaction, because for everything I authorize you, and I will stand and I will pass in all time for that which you should do; and should this my letter power not be sufficient, I will grant judicially as soon as you please, and notify me that you require it and you excusing this trouble. I place myself at your disposal as your most affectionate nephew and servant, who attentively kisses your hands.

(Signed) MIGUEL RABAGO (rubric).

(Endorsement.)

I transfer all my powers in favor of Senor Don Samuel Williams, postmaster of the town of San Felipe de Austin, in order that
46 in my name and as my attorney he may take possession of the eleven leagues expressed in this.

(Signed) VICTOR BLANCO (Rubric).

Monclova, 3d April, 1833.

47 To the admission of which purported power of attorney the plaintiff's counsel objected, because—

First. This letter power found in Samuel May Williams' trunk, in Galveston, by the witness, Kleberg, in 1876, and having been in said trunk since March, 1836, could not have been and was not the instrument by virtue of which the title passed from Rabago, in the city of Mexico, by deed from Blanco to Laguerenne, on the 25th day of May, 1836.

Second. The recitals in the deed to Laguerenne contradict the evidence of the witnesses, Williams and Kleberg, under whose testimony it is introduced.

Third. It cannot be introduced as an ancient instrument, because—

1st. No possession was ever held under it, it not coming to the custody of defendants for forty years after its execution.

2d. It is suspicious on its face by reason of not being acknowledged, certified to, witnessed, nor written on sealed paper.

3rd. It does not come from the proper custody.

Fourth. It is not such an instrument as would have passed title to land in 1832 or in 1836.

1st. It is not acknowledged, witnessed, certified to, nor written on sealed paper.

2nd. No summons was served upon the grantors to appear before an official for the purpose of rendering it an authentic or judicial act.

Fifth. The power to Blanco, if any, could only pass an equitable title, if any, which could not be cognizable in a court of law.

Sixth. It is not made part of the Laguerenne deed.

Seventh. If it conveyed any power, it was divested out of and

from Blanco by the endorsement and delivery to Samuel May Williams in 1833.

Eighth. It appears to have been executed, if at all, before six years from the issuance of the concession, and does not bind the attorney nor his vendees to cultivate the land.

Ninth. If genuine, it was revoked by the war of 1835, the revolution between Texas and Mexico, and the constitution of March 17th, 1836.

Tenth. It cannot act as power to make a parol or verbal sale, because no possession was taken under it within a reasonable time.

Which said objections of plaintiff being overruled by the court, to the ruling and decision of the court thereon plaintiff's counsel did then and there duly except.

Fifth Exception.

Upon the facts already evidenced by the first, second, third, and fourth exceptions, which are made part hereof, concerning said purported letter power of attorney from Miguel Rabago to Victor Blanco, the court instructed the jury as follows, after all the evidence was before the jury:

"By the law in force at the time this letter power of attorney purports to have been transferred to Samuel May Williams,
48 (April 3d, 1833,) authorizing him to solicit title to and take possession of said eleven leagues, and at the time said Blanco made his deed to Laguerenne, Blanco could have procured, if he desired, and retained in his possession a legal copy of the power of attorney which would have all the force and effect of the original." (For full charge see exception sixth.)

To which charge plaintiff's counsel objected, because—

1st. There is no evidence that there was any effort made by Blanco to obtain such a copy, and no such copy was obtained.

2nd. It tended to and did mislead the jury, by drawing their attention to such a possibility in connection with the recital in the deed to Laguerenne, which recital referred to an original, and not a copy.

3rd. The original never having been an archive of any office, no legal copy could in fact have been made, and the charge is an incorrect proposition of law.

4th. If the original had become an archive of any office, it could have been the basis of a certified copy only after notice to Rabago, and of this there is no evidence or pretence that such notice was given.

And from each and every part of said extract herein copied from said charge plaintiff's counsel did then and there duly except.

Sixth Exception.

Upon the facts already evidenced in the fourth and other exceptions concerning said purported letter power of attorney from Miguel Rabago to Victor Blanco, the court further instructed the jury as follows, after all the evidence was in:

"The defendants introduced testimony tending to show that as early as 1838 Hammekin had placed in his possession the deed from Blanco to Laguereinne, referring to such a power of attorney; that he insisted on having an authenticated copy of said power furnished him; that very soon thereafter he received said copy of said power, which he placed (with other title papers) in the hands of his agent, retaining a copy made by said Hammekin, which copy has been given you, declared by the interpreter to be identical (with immaterial exceptions) in terms with the letter power offered by defendants; that Hammekin had placed the testimonio in the land office as required by law of persons having such evidence of title to land in Texas; that said Hammekin paid the Government dues on said grant, had paid taxes, had sent agents on the land as early as the growing settlement of the country so far freed this section of the country from the hostile Indians, as permitted its occupancy, and the assertion of ownership by assuming actual control of it, and that Hammekin and those to whom he conveyed and the defendants claiming under them had continued to assert ownership to these lands under said power of attorney, and if, in your judgment, said proof establishes such facts, and the proof as to the age and custody of the said letter power satisfies you that said paper is as old as its date imports, and has been in the custody that said evidence
49 indicates, you may consider this proof equal to the direct testimony of at least one witness to the signature of Miguel Rabago; and unless in your judgment the evidence of plaintiff's witnesses and all the circumstances of these parties and these transactions as shown by all the testimony proves that Miguel Rabago did not sign said letter power, you will find said letter power to be genuine, and return your verdict for the defendants."

To this extract from the charge the plaintiff's counsel objected, because—

1st. It is a charge upon the weight of evidence.

2nd. It is in itself an incorrect statement of law.

And to each and every part of said extract from the charge, plaintiff's counsel did then and there duly except.

The entire charge is as follows, and made part hereof:

United States Circuit Court, 5th Circuit, N. D. of Texas, at Waco. April Term, 1884.

D. H. WILLIAMS vs. N. H. CONGER *et als.* } No. 3

The district judge charged the jury as follows:

1st. Plaintiff and defendants agree that the lands which are the subject of this suit did, at one time, belong to Miguel Rabago.

2nd. There is no conflict in the testimony as to the fact that the grantor of the plaintiff, Mrs. Rose M. Cortez, is the surviving wife of the said Miguel Rabago and surviving parent of his children, all of whom are now dead, intestate, and without issue, and as such sur-

viving wife and mother is sole heir to whatever property said Miguel Rabago had in these lands at the time of his death.

3rd. There is no proof of limitation in this case to bar any right of Mrs. Cortez, or of the plaintiff holding her right.

4th. It follows then that if Rabago did not sell these lands in his lifetime, but died still holding whatever right he ever had in these lands, said right having passed by descent to Mrs. Cortez and by purchase from her to the plaintiff, he, the plaintiff, is now the lawful owner of these lands, and is entitled to receive, and should be cheerfully and promptly be accorded, your verdict in his favor. No sentimental rhetoric or impassioned declaration touching schoolhouses, churches, mills, numerous families settled upon the land, and such like, or against foreign claimants, speculators, *et cetera*, should be permitted by you to influence your minds in finding your verdict.

If the said Miguel Rabago did not sell the lands in his lifetime, his heir and the plaintiff holding her right is entitled to his own, however numerous and powerful or unfortunate his adversaries may be.

5th. But the defendants say that Miguel Rabago himself in his lifetime sold these lands, and that by mesne conveyances the defendants hold said Rabago's title by purchase and regular transfer, and are thus themselves now the owners of these lands; and in tracing their title the defendants offer, (after the grant to Rabago, upon which both parties rely)—

1st. A paper purporting to be a letter power of attorney from said Miguel Rabago to Victor Blanco.

2nd. A deed by Victor Blanco, assuming to act as attorney of Rabago, to William Laguerenne, and by mesne conveyances from Laguerenne to the defendants. And if all of these papers are genuine, they do conclusively show that Rabago did part with his title to these lands in his lifetime, and no right to them could pass to his heirs by descent, and the plaintiff acquired no right by his purchase from Mrs. Cortez, and therefore must fail to recover in this suit, and the defendants, by reason of their right thus acquired without the aid of compassion or prejudice, are shown to be entitled to retain the lands, and must receive your verdict in their favor.

The issues between the parties arising on the face of these papers present questions for the decision of the judge without reference to you, and for the purposes of this trial have been so far settled by my various rulings, the result of which I have just summarized in the foregoing part of this charge, that there remains to demand your attention but this one question: Is the paper writing produced by the defendants, purporting to be a letter power of attorney from Rabago to Blanco, a genuine paper, or is it a forged writing? This paper writing is offered as an ancient instrument, with proof tending to show that it is in fact more than thirty years old; that it had been acted on by Blanco and those claiming under him down to the defendants, through a period of more than thirty years; that it is produced from the proper custody, and that certain indorsements on it by Blanco and Williams are genuine.

In opposition to this proof by the defendants the plaintiff has introduced a number of living witnesses (examined here on a former trial and their testimony then taken down in writing and read to you on this trial), who testify that they were acquainted with the handwriting of Miguel Rabago from having seen him write, and with his manner of signing his name and making his rubric, and that the signature to this paper purporting to be a letter power of attorney is not Rabago's writing. And the witness, Mrs. Cortez, produces a letter addressed to her, which she says, and several other witnesses say, she received from her husband, Rabago, in 1840, which she is allowed to use in aid of her memory and in support of the accuracy of her judgment and memory of the want of identity or similarity of the signature to the purported power with the signature of Rabago, as she had been acquainted with it, and remembers his signature from having seen him write.

51 This letter you are permitted to receive, and if the proof in connection with this old letter satisfies your mind that it is genuine, and that said letter and the signature to it are in the proper handwriting of said Miguel Rabago, you may use it as a standard of comparison to aid you in determining the genuineness of the signature to the paper purporting to be a letter power of attorney. The defendants have also offered a paper which purports to be the original application of Miguel Rabago for this concession, which purports to be signed by said Rabago in person—that is, by himself—and have offered proof to the effect that this paper came from the office of archives in Saltillo, which is the proper custody for said original application and decrees, and to the effect that the signatures of Governor Viesca and of the secretary are genuine, with proof as to the circumstances of the finding said paper, and manner—keeping said archives; and, if you believe from the proof that said paper so offered by the defendants is as old as its date imports, that it has been preserved in the archives as the initial paper connected with this grant, you may give these circumstances the weight of direct testimony to the genuineness of said signature; and if the other proof in the case does not, in your judgment, overbear this weight, you may find the signature to this original application to be the proved signature of Miguel Rabago, and use it as a standard of comparison to aid you in determining the genuineness of the signature to the writing purporting to be a letter power from said Rabago to Victor Blancho. It is your province and your duty to judge of the credibility of all the various witnesses, and to weigh their testimony and determine its proper force, and in doing this you will bear in mind the relations of the respective witnesses to the controversy and their connection with the parties, their interest, their ages at the time the transactions of which they speak occurred, their situation and means, and likelihood of their having knowledge of the matters to which they depose, the nature of the matters themselves, the condition of the country then and afterwards likely to affect their perceptions of their memories and the consistency or otherwise of their testimony with itself, or with that of the others, or their fidelity. It is a matter of public history that from 1835 to

1848 Texas was in a state of revolt against Mexico; that in March and April, 1836, a Mexican army under Santa Anna swept the coast of Texas from the Rio Grande to San Jacinto, and inflicted such ravages on the American colonists in the province of Texas as compelled all or great numbers of persons (of said colonists) not capable of bearing arms to leave their homes in such haste and confusion as gave to their retreat at that time and for many years afterwards, in Texas, the popular designation of the "runaway scrape;" that from 1835 to 1848 the intercourse between Coahuila and Texas was interrupted by this state of war. By the law in force at the time this letter power of attorney purports to have been transferred to Samuel May Williams (April 3d, 1833), authorizing him to solicit title to and take possession of said eleven leagues, and at the time said Blanco made his deed to Laguerenne, Blanco could have procured, if he desired, and retained in his possession a legal copy of the power of attorney, which would
52 have all the force and effect of the original; and although the original might at the time be in Samuel May Williams' trunk, in Texas, Blanco's conveyance to Laguerenne would not on that account be without authority if the said paper in Williams' trunk was a genuine paper giving him such power. Such power, if conferred, was conferred on the one named, and remained with him, whether evidenced by the original writing or such copy. The defendants have offered proof tending to show that the old letter produced by the witness, Mrs. Cortez, which she and other witnesses testify was received from Rabago in 1840, is written on paper that was never used in Mexico until many years after 1840; and the plaintiffs have offered proof tending to show that such papers might have been in use at that time in Del Norte. If the proof on this point satisfies you that said old letter could not have been written until many years after 1840, you will be at liberty to disregard all the testimony of the said witnesses who testified to the receipt of said letter in 1840.

The defendants introduce testimony tending to show that as early as 1838 Hammekin had placed in his possession the deed from Blanco to Laguerenne, referring to such a power of attorney; that he insisted on having an authenticated copy of said power furnished him; that very soon thereafter he received a copy of said power, which he placed (with other title papers) in the hands of his agent, retaining a copy made by said Hammekin, which copy has been given you, declared by the interpreter to be identical (with immaterial exceptions) in terms with the letter power offered by defendants; that Hammekin had placed the testimonio in the land office, as required by law, of persons having such evidence of title to land in Texas; that said Hammekin paid the government dues on said grant; had paid taxes; had sent agents on the land as early as the growing settlement of the country so far freed this section of the country from hostile Indians as permitted its occupancy and the assertion of ownership by assuming actual control of it; and that Hammekin and those to whom he conveyed, and the defendants claiming under them, had continued to assert ownership to these

lands under said power of attorney, and if, in your judgment, said proof establishes such facts, and the proof as to the age and custody of said letter power satisfies you that said paper is as old as its date imports, and has been in the custody that said evidence indicates, you may consider this proof equal to the direct testimony of at least one witness to the signature of Miguel Rabago, and unless, in your judgment, the evidence of plaintiff's witnesses and all the circumstances of these parties and these transactions as shown by all the testimony proves that Miguel Rabago did not sign said letter power, you will find said letter power to be genuine, and return your verdict for the defendants. If, on the other hand, the proof does not satisfy you that said paper writing, purporting to be a letter power, is in fact as old as it purports to be, or does not satisfy you that said paper has been in the custody of Samuel May Williams, and of his family surviving him, until found by Kleberg, or does not satisfy you that the defendants and those under whom they claimed have acted on this paper writing as Blanco's power to sell, or if
53 the proof satisfies you that the signature to this paper is not the signature of Miguel Rabago, you will find that Blanco had no authority to sell these lands to Laguerenne, and return your verdict for the plaintiff."

A. P. McCORMICK,
Dist. Judge.

On the back of the foregoing charge appears the following endorsements, to wit: "U. S. cir. court. No. 3d. D. H. Williams *vs.* N. H. Conger *et al*: Filed April 16th, 1884. J. H. Finks, clerk. Charge to jury."

Seventh Exception.

Upon the facts already evidenced by the fourth and other exceptions, concerning said purported letter power of attorney from Miguel Rabago to Victor Blanco, the court further instructed the jury as follows:

"But the defendants say that Miguel Rabago, himself in his lifetime, sold these lands, and that by mesne conveyances the defendants hold said Rabago's title by purchase and regular transfer, and are thus themselves the owners of these lands, and in tracing their title the defendants offer (after the grant to Rabago, upon which both parties rely), 1st, a paper purporting to be a letter power of attorney from said Miguel Rabago to Victor Blanco, and, 2nd, a deed by Victor Blanco assuming to act as attorney of Rabago to William Laguerenne, and by mesne conveyances from Laguerenne to the defendants, and if all of these papers are genuine they do conclusively show that Rabago did part with his title to these lands in his lifetime, and no right to them could pass to his heirs by descent, and the plaintiff acquired no right by his purchase from Mrs. Cortez, and therefore must fail to recover in this suit, and the defendants by reason of their right thus acquired without the aid of compassion or prejudice are shown to be entitled to retain the lands, and must receive your verdict in their favor."

To which charge plaintiff's counsel objected, because the letter power of attorney was not such an instrument as could convey land in Texas at the date of its purported execution, and if it could have operated as a parol sale of land it would have been necessary to be accompanied with possession.

To which charge, and to each and every part thereof, plaintiff's counsel did then and there duly except, and refers to the entire charge of court as contained in the sixth exception which is made part hereof.

Eighth Exception.

First. George L. Hammekin, a former owner of the land, and a witness for the defense, testified that when he bought the land from Guillermo Laguerenne, through Francisco Priolland, the attorney of Laguerenne, Priolland had no original nor copy of the power of attorney from Miguel Rabago to Victor Blanco, but at the time of his purchase at New Orleans, February 15th, 1837, he made it a
54 condition of the transaction that Priolland should procure him a certified copy of the letter power of attorney from Rabago to Blanco; that soon afterwards he received such a certified copy from him, which he delivered to Robert Rose; that before delivering it to Rose he made a copy of it, which he identified in court and in the history of this case is known as the "Hammekin copy." This copy with the variances specified in exception 4 is an accurate copy of the letter power found in Samuel May Williams' trunk. This copy was offered in co-connection with Hammekin's other evidence tending to show that the power found in Williams' trunk was an ancient instrument, and the one on which Blanco acted, as shown in exception No. 4, preceding.

The defendants' counsel offered this Hammekin copy in evidence merely as a fact showing that as early as 1838 Hammekin had it in his possesssion, and not as a muniment of title, but as tending to show that the letter power found in Williams' trunk is an ancient instrument, and was the identical power under which Blanco acted in making the sale to Laguerenne.

For full text of this Hammekin copy and translation see fourth exception, which is made part hereof.

To the introduction of this copy made by Hammekin, Robert Rose having lost the original purported certified copy received from Priolland, counsel for plaintiff objected, because—

1st. There is no evidence of the execution of the original used by Blanco.

2nd. The certificate of the purported certified copy shows it to have been not an archive of the notary's office.

3rd. If genuine, the original could not have passed title in 1832 or in 1836.

4th. It is immaterial as a fact that such a paper was in Hammekin's possession in 1838, or any other time, and tended to mislead the jury by supplying a seeming pretended certified copy of the power of attorney to Blanco.

5th. There could have been no such paper as a true certified copy of the original power, it never having been an archive of any office.

The court overruled the objections and admitted the Hammekin copy for the purposes for which it was offered. To which ruling and decision of the court counsel for the plaintiff did then and there except.

Second. Upon the facts as evidenced in the first subdivision of this the eighth exception the plaintiff's counsel prayed the court to instruct the jury as follows:

55 "EXHIBIT A."

In U. S. Cir. Court, Northern District of Texas.

DAVID H. WILLIAMS *vs.* N. H. CONGER *et als.*

APRIL 16, 1884.

The jury is instructed, by request of plaintiff, that the copy of the *copy of the* power of attorney said to have been in the possession of Hammekin goes to the jury only for the purpose of showing that he had such a paper in his possession, and cannot be relied on as a muniment of title by the defendants.

HERRING & KELLY,
JAMES M. ANDERSON,
EUGENE WILLIAMS,
For Plaintiff.

Refused.

A. P. McCORMICK,
U. S. Dist. Judge.

On the back of the above asked-for charge there appears the following endorsements, to wit: "No. 3. David H. Williams *vs.* N. H. Conger *et als.* Charge asked by plaintiff. Filed April 17th, 1884. J. H. Finks, clerk."

This charge the court refused to give and overruled the same, to which ruling and decision of the court plaintiff's counsel then and there duly excepted.

The whole charge, as contained in sixth exception, is hereby referred to and made part hereof.

When this "Hammekin copy" was offered it was distinctly stated to the court and jury that it was not offered as a muniment of title, but as a circumstance tending to show that the power found in Williams' old trunk, and offered in evidence as a muniment of title, was an ancient instrument, and was the genuine power under which Blanco acted in making the sale to Laguerenne.

Ninth Exception.

First. On the 25th day of May, 1836, in the city of Mexico, Victor Blanco, purporting to act under a letter power of attorney, sold

the land in question to Guillermo Laguerenne, by an act of sale passed before Miguel Diez de Bonilla.

CRESCENICO LANDGRAVE, by deposition taken by the defendants before Julius A. Skilton, U. S. consul in the city of Mexico, on the 20th Oct., 1875, testified:

I have charge of the notary office of Domingo Rocha, a notary public, and of the archives of the city, in which the judicial records of the deceased clerks of an office who have not held a public office, and which records, by the laws of the land, has been ordered to be gathered together, and that they reach from the conquest of Mexico by the Spaniards to this day. I have in my custody the records of the notary public Miguel Diaz de Bonilla, from 1822 to 1855, and I know his writing and signature that he used when young; and he arrived at the age of more than 80 years, and having lost the use of his hand, remained authorized by a decree of the government of Mexico to use a seal bearing his name, and I know also the seal referred to, which seal Bonilla used the last years of his
56 life. He died three or four years ago. The records of said Bonilla actually in my custody are the same of said Bonilla, and were officially put in my custody. I kept up close personal relations with said Bonilla, and in effect I received said records personally from the hands of Bonilla in accordance with the law of 29th Nov., 1867. I have shown to the consul, Julius A. Skilton, the record referred to, in which there is found the writing or instrument of the said conveyance of Rabago by Blanco to Laguerenne to 11 leagues of land in Texas, under date of May 25th, 1836, and of which document said Julius A. Skilton may request a copy. I recognize thereto said signature of Bonilla. It is the official signature of Bonilla to said conveyance. I will take out an official copy from the writing or instrument mentioned compliant to a commission directed to me for this object, as it is required by the law of Mexico. The power referred to in the same instrument or writing was examined and noted and returned to the interested —, as it has been customary in this country. In the previous question he is asked to make an official copy of said conveyance and of every paper connected with it. The next question: Having made said copy, please compare it carefully with the protocol, and say whether it is an exact and literal copy? To which he replies: According to the laws of the country, if public notaries give a copy or testimony of the documents that exist in the records in their custody, and if they certify that they are copies, is a guarantee that they are faithful and true copies, and that such are the copies required.

In interrogatory 9th Landgrave is asked:

Having examined the same, and finding it to be a literal copy of of the protocol, please procure the certificate and seal of the secretary of State thereto, authenticating in the usual form for official character, and annex the same to your answers.

He answers: This does not belong to my profession, and I recommend the consul, Julius A. Skilton, to have it made. I have writ-

ten my name on said copy to identify it, and have annexed it to my answers.

In interrogatory 11 Landgrave is asked:

Are you acquainted with the officer or official person who has the custody of the protocol of the notary public Francisco de Madriago; please examine said protocol and answer; do you find a power of attorney from Guillermo Laguerenne to Francisco Priolland, authorizing him to sell the same land, dated about the 10th of January, 1837?

He answers: My friend and brother in office, the notary public Antonio Ferreira, has the record of the deceased notary public Francisco Madriago. I have no right to examine the original records in custody of other notaries. The copy of the writing annexed (purported certified copy of a power of attorney from Guillermo Laguerenne to Franciso Priolland, inserted below), given by the notary public Antonio Ferriera, as a public officer, deserves all faith and credit. I have written my name on the copy and annexed it to my answers.

Geo. L. Hammekin testified by deposition taken in 1875—

57 That when he purchased the land in question in 1837 from Laguerenne, by Priolland, att'y, the latter delivered to him the original act of sale (or deed) from Miguel Rabago, by Blanco, att'y to Laguerenne. That it was executed before Miguel Diez de Bonilla. That he was acquainted with said Bonilla's handwriting, and knew it well, and his signature to said act of sale was his genuine signature. (See his testimony in 4th bill of exception.)

The loss of the original deed from Blanco to Laguerenne, and of the power of attorney from Laguerenne to Priolland was proven, and that due search had been made for them.

The defendants' attorneys then introduced in evidence the purported copies of the deed from Victor Blanco to Guillermo Laguerenne, dated city of Mexico, May 25th, 1836, and of the power of attorney from Guillermo Laguerenne to Francisco Priolland, dated city of Mexico, January 10th, 1837, both papers being of the following tenor:

58 *Translation.*

Second class. Fifty cents.

Mexican Republic.

(A seal) for the bienium of one thousand eight hundred and seventy-four & seventy-five.

(A seal,) chief administration of the rent of sealed paper of the district.

In the city of Mexico, on the twenty-fifth of May, of one thousand eight hundred and thirty-six,

Before me, notary public and witnesses, Don Victor Blanco in name of Don Miguel Rabago, in virtue of letter power which has conferred on him for various purposes, among which is comprised

the faculty that he can sell and may sell the lands which he has in Texas, which he showed to me, which I have seen read and returned to the party and to it in his possesion I refer said: That the aforesaid Don Miguel Rabago possesses as his own and in virtue of a purchase which he made from the State of Coahuila & Texas, eleven leagues of land, which are situated on the western bank of the river Brazos, above the road which goes from the town of Nacogdoches to Bejar, which he has contracted to sell to Don Guillermo Laguerenne for the amount of one thousand dollars, and having been asked for the formality of the contract that the corresponding document should be granted to him by the present and in the most ample form that by law there is room so that it may be firm and vaild, Don Victor Blanco "otorga" (testified that he grants) that in name of his principal, Don Miguel Rabago, his heirs and successors, present and future, he sells in true sale, to take effect from to-day forever, to Don Guillermo Laguerenne, and to his, and to whoever from him or from them should in any manner have title, right, or recourse, to wit: Eleven leagues of land situated on the eastern bank of the river Brazos, above the road which goes from the town of Nacogdoches to Bejar, adjoining on the south a tract of land of Don Rafuel de Aguirre, and begins at the northeast corner of said Aguirre, which is a cottonwood ten inches in diameter, on the bank of said river, from which another 6 inches diameter bears south 70 degrees 30 minutes east eleven varas, and another cottonwood eight inches diameter bears north 64 degrees 30 minutes west twelve and six-tenths varas, which is the first corner. Thence south 62 degrees west, and with the upper line of said Aguirre, at 18,833 varas, the northwest corner of said Aguirre, and with 4,757 varas more, which form the sum of 23,590 varas, second corner.

Thence north 28 degrees west 13,750 varas to a mound of earth for the northwest and third corner.

59 Thence north 62 degrees east at 18,990 varas, a cottonwood 10 inches in diameter on the bank of the river, and south 63 degrees 15 minutes east at the distance of four varas there is another cottonwood of eight inches diameter, which is the northeast corner of this land, and is the fourth and last corner, and adjoins vacant lands; thence following the meanders of the aforesaid river down stream to the place of beginning, comprising two hundred & seventy-five millions of square varas, or, its equivalent, eleven leagues of land, which he purchased from the State of Coahuila & Texas, in accordance with the colonization law of 24th March, 1825, as everything appears from the testimony of the documents drawn to that effect, delivered by Don Vicente Aldrete, commissioned by that supreme government to deliver possession to sundry Mexicans of the lands of which a sale had been granted to them, dated in Nacogdoches, 14th January, 1834, and he sells them for the sum of one thousand dollars, free from all expenses, as the purchaser has to pay the duties of alcabala and the other legal costs which may arise after receiving possession of everything which in fact and in law belongs to them; and he gives himself as satisfied with said sum of one thousand dollars as if they were here counted

out to him and delivered to his satisfaction, concerning which he renounces the laws of non-delivery, proof of receipt, and other laws of this kind, and the power to say and, allege the contrary in all time, for which he grants letter of payment and formal receipt, and declares that said amount is the just price and true value of said eleven leagues, which are not worth more; and in case they are worth more of the excess and greater value that they might have, he makes to the purchaser a pure, more perfect, and irrevocable grace and donation, which the law calls "inter viros," with all the insinuations and renunciations of the necessary laws, and of those laws which treat of the things which are bought & sold for more or less than the half of their just value, & the remedy of the four years in them declared to be able to ask for the rescission of the contract, and from to-day henceforward desists and takes away from his principal, and from his heirs and successors, the right, property, and ownership which he has had and has to said leagues, and to that which appertains to them, and cedes, renounces, and transfers them to said purchaser that he may act and dispose of them at will, as of his own property, had and acquired with a just and legitimate title of sale & purchase as this is; and he also declares that said leagues are not affected nor mortgaged for any amount, except the payment of them to the Government and compliance with the laws; and he gives the power and faculty which are required by law and should be necessary in order that he may authoritatively or judicially, or as may best suit his convenience and appear proper to him, take and keep the holding and possession of them & of what belongs to them, and in the interim that he does so he constitutes him as his tenant holder and precarious possessor to assist him with them whenever asked for; and that in virtue of this document and other antecedents which he delivers to him as proof of possession and true tradition it may be seen
60 that he has acquired and held, and, as the real vendor, he obliges his principal to the proof security and warranting of this sale in such manner that no third party will appear who may represent a better right to said eleven leagues, and that no lawsuit, embarrassment, or contradiction shall exist; and should a lawsuit appear and commence immediately, that he is advised and required, even if after the demand has been answered and the publication of the proofs made, he will take up the case and defense & will go on with it and pay the costs & expenses until leaving the purchaser in quiet & peaceable possession; and, if unable to make it good, he will return and will pay the thousand dollars which he has received, that which he might have expended, improved, and augmented, & other costs demanded of him—deferring everything which should require proof on the simple oath of the buyer without any other that might relieve him. To the compliance of which he binds the property of his principal, present and future, in manner and conformably to law, submitting him to the power and jurisdiction of the judges and tribunals which may or ought to have cognizance of such cases as the present, so that they may compel and sentence him to it as if it were already a sentence passed by authority of a matter adjudged; he renounces his domicile & neighborhood, the

laws which favor him with the general of the law in form; and, being present, Don Guillermo Laguerenne, having heard and understood the tenor of this document, subscribes that he accepts it according to that which is contained, expressed, & declared in it; receives, as purchased, the eleven leagues of land specified in it, and acknowledges the receipt of the original titles and of those acquired by the said one thousand dollars, being for his account the payment of the notarial duty of alcabala; and they sign this, being witnesses, Don Mariano Davila, Don Melguiades Cabarravias, & Felipe Revilla Olivares, of this vicinity. I testify that I am acquainted with the parties, Victor Blanco, Gmo. Laguerenne.

MIGUEL DIEZ DE BONILLA,
Notary Public.

Citizen Mariano Dominguez, treasurer of the custom-house of Mexico, certify: That on this day Don Guillermo Laguerenne paid sixty-three dollars four reals nine grains alcabala on one thousand dollars, for which he bought of Don Victor Blanco, as attorney for Don Miguel Rabago, eleven leagues of land, which, by virtue of the law of colonization of 24th March, 1825, he purchased from the State of Coahuila and Texas, situated on the western bank of the river Brazos, above the road which goes from the town of Nacogdoches to Bexar, according to the survey which is evident in the title of acquisition in favor of Guillermo Laguerenne, the national duty of alcabala, being for account of the purchaser, according to the certificate of 27th May, from the notary, Don Miguel Diez de Bonilla, Mexico, 27th May, 1836. (P. L. C., at request of the treasurer.)

J. LUIS ROJAS.
SCHIAFINO.

No. 146. $63. 4. 9.

61 I certify and give faith that the preceding copy is faithful & exact to the letter of the original document which exists on folio 37 to folio 40 of the protocol of my deceased companion, Don Miguel Diez de Bonilla, which I have under my custody in the archives of the city which is under my charge, from whence the present was taken in order to deliver it to the consul of the United States of the North, in Mexico, by virtue of judicial mandate, this 15th December, 1874, in presence of Don Miguel Moral and Don Manuel Correo, of this vicinity. (Between parenthesis:) All not valid.

[L. S.] (Signed) CRESCEN. LANDGRAVE.

The undersigned notaries public certify and give faith that Don Crescinca Landgrave is a notary public, as he styles himself, and it is his seal and signature with which the foregoing certified copy is authenticated; that said notary isreliable and trustworthy, and acts with general acceptation, giving to whatever he authenticates with his said seal and signature entire faith and credit, in court and elsewhere.

In testimony of which we give the present certificate, sealed with

the seal of our National College, in the city of Mexico, the fifteenth day of December, one thousand eight hundred and seventy-four.

[Seal National College of Notaries.]

[SEAL.] YGN. COSIO (rubric).
[SEAL.] JOSE VILLELA (rubric).
[SEAL.] FRAN'SCO QUERIJAZA, *N. P.*, (rubric).

The citizen, Joaquin O. Peres, governor of the Federal district, certifies that the signatures and seals which precede are the same that are used in everything which in this manner they authenticate by the above-named persons, who form part of the National College of Notaries at the capital.

And, in conformity with the law of the 28th of October, 1853, I issue the present in Mexico, the fifteenth day of December, one thousand eight hundred and seventy-four.

[SEAL.] JOAQ. O. PERES (rubric).

Without fees.

The undersigned, chief official of the Department of Foreign Relations, certify: That the citizen, Joaquin O. Peres, is governor of the Federal district, and his signature is the same as that which precedes, and also the seal which accompanies it, is that of the said governor.

Mexico, December 15th, 1874.

Number 476.

Fees, five dollars.

[Stamp:] Third. Second class fifty cents. Republic of Mexico. For the two years one thousand eight hundred & eighty-four and five.

[Seal:] Principal administrator of the tax of sealed paper of the district.

[SEAL.] JUAN DE ARIAS (rubric).

62 To the original of the foregoing translation is attached the following certificate, to wit:

CONSULATE GENERAL OF THE UNITED STATES OF AMERICA.
MEXICO CITY, *December 15th*, 1874.

I, Julius A. Skilton, consul general of the United States of America at Mexico City, hereby certify that the foregoing signature is that of Juan de Arias, first under secretary of the Department of Foreign Relations of the Government of Mexico, and as such with the accompanying seal of said Department is entitled to full faith and credit.

Witness my hand and the seal of the consulate general, this 15th day of January, 1874.

[SEAL.] JULIUS A. SKILTON (rubric).
U. S. Consul Gen'l.

No. 114; fee, $2.

[Stamp:] Third. Second class fifty cents. For the two years one thousand eight hundred & seventy-four and seventy-five.

Antonio Ferreiro, notary public of the Federal district, certifies: That in the book of protocols of the deceased notary, Don Francisco de Madriada, whose notarial record is in my charge, is found an instrument of the following tenor:

Second seal. (L. S.) Twelve reals. For the years 1836–'37.

In the city of Mexico, on the 10th day of January, 1837, before me; a notary public, & witnesses, personally appeared Don Guillermo Laguerenne, a citizen, & of the commerce of this place in whom I have faith and know, and he said he gave his full and ample power of attorney to Don Francisco Priolland, a citizen of New Orleans & a transient in this capital. That he may, in his name and representing him, sell, alienate, mortgage, barter, or in whatever mode dispose [of] all or part of the real estate of whatever class the undersigned may possess and that may belong to him, in whatever kingdom or republic, for the sum that he may judge to be enough. Cash or on time for discounts or premiums, or without them, and with the conditions he may judge convenient. And in consequence thereof to make all deeds and writings, and with the clauses, conditions, and renunciations of laws, and with all other conditions that would lead to the security of the buyers, divesting himself from all ownership of these lands. And that he may do all things as if the undersigned were there himself, and that no omissions or fact of proceeding omitted in this power of attorney will the undersigned take anvantage of.

And he obligates to this his property in whatever country
63 it may be, that the judges may decide upon it as if sentence was already passed, and to this end he renounces his domicile and citizenship, and the laws in his favor and defense, and the general of right; and he signed, being witnesses the citizens Manuel Madriaga, Manuel Cayetano Gracia, and Jose Lulata, of this vicinity. And at the time of closing this instrument he added that he also gave his attorney the right to collect and receive all moneys or property due him or to come, and that he may take arrangements, and that he may take all further steps to carry out this business or submit it to an arbritrator, arbitrators, umpires, and obligating myself to submit to their acts & decisions.

GUILLERMO LAGUERENNE.

FRANCISCO DE MADRIAGO,
Notary Public.

And it was delivered to the party interested the day of its making on this sheet of the second seal correct.

(Signed) FRANCISCO DE MADRIAGO,
Es. Pacional.

The undersigned, clerk of the 6th civil court, certifies: That to the application made by Mr. Julius A. Skilton, consul general of the United States of America, asking for an order to the citizen, Notary Antonio Ferreiro, for a certified copy of the power of att'y, which on the tenth day of January, one thousand eight hundred and thirty-

six, Don Guillermo Laguerenne executed in favor of Don Francisco Priolland, the citizen judge of the 6th civil court, Licentiate Ysidoro Guerrero has decreed in conformity thereto, ordering this present certificate to be issued for the protection of the notary. And in compliance with that order I issued the present, in Mexico, on the fifteenth of December, one thousand eight hundred and seventy-four.

[SEAL.] MANUEL RAZ GUZMAN, *E. P.*

And in conformity with the order of the citizen judge of the 6th civil court, Licentiate Ysidoro Guerrero, in the decree to which the inserted certificate refers, I issue the present as custodian of the notarial records of the notary, Don Francisco de Madriaga, in the city of Mexico, fifteenth day of December, one thousand eight hundred and seventy-four. I give faith.

[SEAL.] ANTONIO FERREIRA (rubric).

The undersigned notaries public certify and give faith that the seal and signature with which the above certificate is authenticated is that of our companion, Don Antonio Ferreira, a notary public, as he styles himself; worthy of confidence, and acts with general acceptation, giving to whatever he authenticates with his said
64 seal and signature entire faith and credit, in court and elsewhere.

In testimony of which we give the present, sealed with that of our National College, in the city of Mexico, on the fifteenth day of December, one thousand eight hundred and seventy-four.

[Seal National College of Notaries.]

[SEAL.] JOSE VILLELA (rubric).
[SEAL.] YGN. CASIO (rubric).
[SEAL.] CRESC'NC. LANDGRAVE (rubric).

[Stamp:] Third. Second class, fifty cents. For the two years one thousand eight hundred and seventy-four & seventy-five.

[Seal:] Chief adm'r of income on sealed paper of the district.

The citizen Joaquin O. Peres, governor of the Federal district, certifies that the seals and signatures above are the same that are used in everything which in this manner they authenticate, by the above-named persons, who form part of the National College of Notaries at the capital. And in conformity with the law of the 28th of October, 1853, I issued the present in Mexico, the fifteenth day of December, one thousand eight hundred and seventy-four.

[SEAL.] JOAQ'N O. PERES (rubric).

Without fees.

The undersigned, chief official of the Department of Foreign Relations, certifies that the citizen Joaquin O. Peres is governor of the Federal district, and that his signature is the same as that above, and also the seal which accompanies it is that of the said governor.

Mexico, December the 15th, 1874.

[SEAL.] JUAN DE ARIAS (rubric).

CONSULATE GENERAL OF THE UNITED STATES OF AMERICA,
MEXICO CITY, *December 15th*, 1874.

I, Julius A. Skilton, consul general of the United States of America at Mexico city, hereby certify that the foregoing signature is that of Juan de Arias, first under secretary of the Department of Foreign Relations of the government of Mexico, and as such is entited to full faith and credit as such, with the seal of said department which accompanies.

Witness my hand and official seal of this consulate general this 15th day of December, 1874.

[SEAL.] JULIUS A. SKILTON (rubric),
U. S. Consul Gen'l.

No. 113. Fee, $2.00.

65 To the introduction of said papers counsel for plaintiff objected.

As to the deed from Blanco to Laguerenne because—

1st. Rabago's name is not signed to the original, and, if any, only an equitable title would pass, not cognizable in this court.

2nd. It is not an examined copy.

3rd. It is not a duly certified copy, because—

First. The under secretary of Foreign Affairs makes the certificate, and not the secretary in person.

Second. The notary appears to hold the original by virtue of a foreign Mexican statute of 1867, which is not properly proven to show in our courts his authority or the law concerning the record.

4th And if certified, an examined, and not a certified, copy of a foreign notary's record alone is admissible.

In addition to the above objections plaintiff objects as to the purported power of attorney from Laguerenne to Priolland, because—

1st. The original purported records of Madriago are not identified nor proven to be those in the hands of Ferreiro.

2nd. If the records of Madriago, the power in question is not shown to be that of Laguerenne.

3rd. It is not shown by what authority Ferriera holds the purported records of Madriago.

The court overruled both objections and admitted both papers in evidence.

To which ruling and decision of the court admitting said papers plaintiff's counsel did then and there duly except.

Second. Upon the evidence contained in this the ninth exception, first, and especially the recital in the deed of Blanco to Laguerenne, and the introduction of all other evidence in the cause, plaintiff's counsel prayed the court to charge the jury as follows:

"EXHIBIT C."

In Circuit Court of United States, Northern District of Texas.

DAVID H. WILLIAMS *vs.* N. H. CONGER *et als.*

APRIL 16, 1884.

To the Jury: You are instructed, at the request of the plaintiff,

that in considering the authority under which Blanco sold to
66 Laguerenne, in May, 1836, the notary's recital that he returned the power of attorney to Blanco is true, and the defendants are estopped from denying the fact, and in this connection—

2nd. You are further charged that in order to find for the defendants you must believe that the power of attorney under which the sale was made to Laguerenne by Blanco is the same which is presented to you in evidence as having been found in the trunk of Samuel May Williams by his son, Wm. H. Williams.

HERRING & KELLY,
JAMES M. ANDERSON,
EUGENE WILLIAMS,
For Plaintiff.

Refused.

A. P. McCORMICK,
U. S. Dist. Judge.

On the back of this asked-for charge appears the following endorsements, to wit: "No. 3. D. H. Williams *vs.* N. H. Conger *et als* Charge asked by plaintiff. Filed April 17th, 1884. J. H. Finks' clerk."

This charge the court declined and refused to give, to which ruling and decision of the court the plaintiff's counsel did then and there duly except.

For full charge of court see sixth exception, made part hereof.

Tenth Exception.

The power of attorney inserted at length in the preceding exception recites: "In the city of Mexico, on the 10th day of January, 1837, before me, a notary public, and witnesses, personally appeared Don Guillermo Laguerenne, a citizen, and of the commerce of this place, in whom I have faith and know, and he said," &c.

GEO. L. HAMMEKIN, in deposition taken in Mexia, Texas, on the 29th day of March, 1875, testified in answer to a question concerning the nationality of Guillermo Laguerenne: "I do not recollect whether Guillermo Laguerenne was an American or a Frenchman."

GEO. L. HAMMEKIN, the same witness, in a deposition taken in Waco, Texas, testified:

"I am well acquainted with said Laguerenne; I knew him in Mexico for several years before March, 1836, and subsequently met him in Philadelphia, Penn., where he had a brother much older than himself, a merchant in that city for very many years; I do not recollect whether Guillermo Laguerenne was a Frenchman or an American; in May, 1836, he was established as a merchant in the city of Mexico; I don't think he ever lived in Texas."

Upon this evidence the plaintiff's counsel requested the court to charge as follows:

67 "EXHIBIT B."

In the U. S. Circuit Court for the Northern District of Texas, at Waco. April Term, 1884.

DAVID H. WILLIAMS *vs.* N. H. CONGER *et als.*

1st. The jury are instructed, at the request of the plaintiff, that on the 25th day of May, 1825, at the date of the deed from Blanco, as attorney in fact for Miguel Rabago, "No alien could hold land in Texas," and a deed to an alien would have been null and void.

2nd. If you believe from the evidence that Laguerenne, to whom Blanco purported to sell, was an alien to Texas, and a resident citizen of the city of Mexico, then you are further instructed that you must consider such sale invalid and a nullity, and you will find for the plaintiff.

HERRING & KELLY,
JAMES M. ANDERSON,
EUGENE WILLIAMS,
For Plaintiff.

Refused.

A. P. McCORMICK,
U. S. Dist. Judge.

On the back of this asked-for charge, appears the following endorsements, to wit: "No. 3. David H. Williams *vs.* N. H. Conger *et als.* Charge asked by plaintiff. Filed April 17th, 1884. J. H. Finks, clerk."

68 This charge the court declined to give, but overruled the same.

To which ruling and decision of the court plaintiff's counsel did then and there except.

It was in evidence that Miguel Rabago and his wife, Rosa Musquiz Rabago, and their family, were citizens of the town of Santa Rosa, in the State of Coahuila, Mexico, and lived there all of their lives.

It was in evidence that the purchase-money, which Miguel Rabago was to pay the State of Coahuila and Texas on his purchase, was $1,200.00, on four (4), five (5), and six (6) years' time from the extension of the final title, on January 13th, 1834. That this purchase-money had not been paid when Geo. L. Hammekin purchased the land from Laguerenne on February 15th, 1837.

That Geo. L. Hammekin paid this purchase-money to the proper officers of the republic of Texas after he purchased.

The deed from Rabago, by Blanco to Laguerenne, was admitted in evidence after the above-recited testimony of Geo. L. Hammekin, as to the nationality of Laguerenne, had been introduced in evidence.

Eleventh Exception.

Counsel for plaintiff, in an argument before the jury before
69 this particular argument of counsel for defendants was made, had taken the position that the letter power of attorney from Miguel Rabago to Victor Blanco found in the trunk of Samuel May Williams, and produced in evidence by defendants, was not an "ancient instrument" in its legal sense, because the other evidence of defendants showed that it was not the particular power under which Blanco sold the land to Laguerenne, and could not have been in the custody of Blanco at the time such sale was made, quoting specially the case of Watrous *vs.* McGrew, 16th Texas, and challenged opposing counsel to deny that such was the law. Counsel for defendants, in reply, stated to the jury that it was not necessary in refutation of the statements of counsel for the plaintiff to go beyond the particular case at bar, in which the supreme court had decided the identical question raised by counsel for the plaintiff, and had expressly decided that such letter power was an ancient instrument, and that Blanco could have procured a copy of it when he sold to Laguerenne. Counsel for plaintiff then rose and objected to any reference by counsel for defendants to a former decision of a case at bar, and the court, without ruling definitely, in express terms suggested to counsel for defendants that he ought in the same connection to inform the jury that the question of the genuineness of the power of attorney had not been passed on by the supreme court of Texas, which counsel for defendant immediately did, and thereupon counsel for plaintiff objected further to the explanation, stating that the explanation was worse than the original statement; to which the court replied that the explanation was satisfactory to the court.

It is agreed that the foregoing is a true and correct statement of the proceedings in the trial of the above cause.

HARRISON, CLARK & GRAHAM,
Att'ys for Def'ts.

HERRING & KELLY,
JAMES L. ANDERSON &
EUGENE WILLIAMS, *For Plaintiff.*

Approved: A. P. McCORMICK,
U. S. Dist. Judge.

Inasmuch as the foregoing matters of law and the said several rulings, instructions, and decisions of the court do not appear upon the record of the trial thereof on the prayer of the said plaintiff by his said counsel, the said judge signs this as and for the bill of exceptions in this said cause as of the 17th day of April, 1884, the day said verdict was rendered, and as at the April term of said court, 1884, as by order of said court allowing the framing and filing said bill of exceptions in vacation will appear of record on the minutes of said court.

Done in vacation, this 16th day of June, A. D. 1884.

A. P. McCORMICK,
Judge of the District Court of U. S. of the Northern District of Texas, holding said Circuit Court.

70 *Bond for Writ of Error. Filed April 25th*, 1884. *J. H. Finks, Clerk.*

Know all men by these presents, that we, D. H. Williams, as principal, are held and firmly bound unto Harvey E. Conger, Edward D. Conger, Charles C. Conger, Ralph E. Conger, Newton A. Conger, Mary A. Conger, McCormick, P. McCormick, Thomas Harrison, W. H. Smith, James Sadler, & W. C. Talbert defendants, in the full and just sum of four thousand dollars, to be paid to said defendants, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, excutors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 25th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at a stated term of the circuit court of the United States for the northern district of Texas, in a suit depending in said court between D. H. Williams, plaintiff, and Harvey E. Conger and others, said defendants, No. 3 on the docket of said circuit court of the United States for the northern district of Texas, a judgment was rendered against said D. H. Williams, plaintiff, and the said D. H. Williams, plaintiff, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Harvey E. Conger and others, the said defendants, citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such, that if the said D. H. Williams, plaintiff, shall prosecute the said writ of error to effect, and answer all damages and costs if plaintiff fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

D. H. WILLIAMS. [SEAL.]
M. D. HERRING. [SEAL.]
EUGENE WILLIAMS. [SEAL.]
S. A. OWENS. [SEAL.]

Approved by—

A. P. McCORMICK,
U. S. Dist. Judge, North. Dist. of Texas.

Endorsed on the back, as follows, to wit: "M. D. Herring and Eugene Williams, of counsel for plaintiff in error, D. H. Williams, are hereby permitted by the court to execute the within bond for writ of error, this April 25, 1884. A. P. McCormick, U. S. dist. judge."

71 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } *ss:*
Northern District of Texas, }

I, J. H. Finks, clerk of the circuit court of the United States of America for the northern district of Texas, in the fifth circuit, by

virtue of the annexed writ of error and in obedience thereto, do hereby certify that the foregoing and attached pages, numbered from one to ninety, inclusive, contains a true and complete transcript of the record and proceedings had in said court in said case of David H. Williams, plaintiff in error, *versus* Norman H. Conger *et al.*, defendants in error, and the assignment of error, as the same remains of record and on file in said office.

In testimony whereof, I have caused the seal of said court to be hereunto affixed, at the city of Waco, in the northern district of Texas, in the fifth circuit, this the 3d day of September, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] J. H. FINKS, *Clerk.*

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between D. H. Williams, of the county of Sumter, State of Alabama, plaintiff, and Edward D. Conger, W. H. Smith, W. C. Talbert, Thomas Harrison, James Sadler, Harvey E. Conger, for himself and as executor and guardian; Mary A. Conger, P. McCormick, Charles C. Conger, Ralph E. Conger, Newton A. Conger, defendants, a manifest error hath happened, to the great damage of the said D. H. Williams, plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 25th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] J. H. FINKS,
Clerk of the 5th Circuit Court of the United States,
Northern District of Texas.

Allowed by— A. P. McCORMICK,
U. S. Dist. Judge North. Dist. of Texas.

73 The United States of America to Edward D. Conger, W. H. Smith, W. C. Talbert, Thomas Harrison, John Sadler, Henry E. Conger, for himself and as exector & guardian; Mary A. Conger McCormick, P. McCormick, Charles C. Conger, Ralph E. Conger, and Newton A. Conger, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the fifth circuit court of the United States for the northern district of Texas, at Waco, wherein D. H. Williams is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. P. McCormick, judge of the district court of the United States for the northern district of Texas, holding sessions of the 5th circuit court of the United States, at Waco, for said district, this — day of April, in the year of our Lord one thousand eight hundred and eighty-four.

A. P. McCORMICK,
U. S. Dist. Judge.

74 [Endorsed:] Service accepted and citation waived. Waco, Texas, April 25, 1884. Thomas Harrison, E. H. Graham, Geo. Clark, att'ys for defendants. Filed April 25, 1884. J. H. Finks, clerk.

75 *Assignment of Error.*

Endorsed, to wit: No. 3. U. S. cir. court. D. H. Williams *vs.* N. H. Conger *et als.* Filed Sept. 1st, 1884. J. H. Finks, clerk.

In Supreme Court of the United States, October term, 1884.

D. H. WILLIAMS, Plaintiff in Error,
vs.
N. H. CONGER *et als.*, Defendants in Error.

Assignment of error.

Afterwards, to wit, on the second Monday in October of said term, before the justices of said court, at the Capitol in the city of Washington, comes the said D. H. Williams, plaintiff in error, by his attorneys, and says that in the record and proceedings of the above-styled cause there are manifest errors in this, to wit:

The court below erred—

76 1st. In allowing to the jury the pretended application of Miguel Rabago to Viesca, the Governor of the State of Coahuila and Texas, for eleven leagues of land (Transcript, pages 28 and 30), and the pretended concession of Viesca, granting the prayer (Transcript, pages 29 & 31); and especially did the court err in submitting these papers to the jury for the purpose of comparing the

handwriting thereof with the pretended signature of Miguel Rabago to the pretended power of attorney from Miguel Rabago to Victor Blanco (Transcript, pp. 40 & 42), claimed by the plaintiff in error to be forged.

2d. In refusing to submit to the jury the following charge asked by plaintiff in error to control them in their consideration of said pretended application and concession, after its introduction over protest of plaintiff in error:

"The jury are instructed, at the request of the plaintiff, that a paper has been introduced by the defendants purporting to be the original concession of Governor Viesca to Miguel Rabago, and that it has been commented on in the argument as containing the
77 original signature of Miguel Rabago. In this connection you are charged that at the date of such signature the law did not require the same to be signed by Rabago, and the concession goes to you for your consideration as one of the links in the chain of defendants' title, and not for the purpose of comparison of handwriting; and you will not in your deliberations consider such signature as the signature *as the signature* of Miguel Rabago for the purpose of comparison of handwriting." (Transcript, p. 35.)

3d. In charging the jury upon the legal effect of said pretended application and concession, as follows:

"The defendants have also offered a paper, which purports to be the original application of Miguel Rabago for this concession, which purports to be signed by said Rabago in person—that is, by himself—and have offered proof to the effect that this paper came from the office of the archives at Saltillo, which is the proper custody for said original application and decree, and to the effect that the signatures of Governor Viesca and of the secretary are genuine, with proof as to the circumstances of the finding said paper and
78 manner of keeping said archives; and if you believe from the proof that said paper so offered by the defendants is as old as its date imports, that it has been preserved in the archives as the initial paper connected with this grant, you may give these circumstances the weight of direct testimony to the genuineness of said signature; and if the other proof in the case does not, in your judgment, overbear this weight, you may find the signature to this original application to be the proved signature of Miguel Rabago, and use it as a standard of comparison to aid you in determining the genuineness of the signature to the writing purporting to be a letter power from said Rabago to Victor Blanco." (Transcript, p. 36.)

4th. In submitting to the jury the pretended power of attorney from Miguel Rabago to Victor Blanco (Transcript, pp. 50, 51), authorizing the latter to sell the land in question, through which defendants in error claim as against the vendee of the heir of the said Miguel Rabago, plaintiff in error. (Transcript, pp. 50 to 53.)

5th. In charging the jury upon the right of Blanco to get a copy of said pretended power, there being no evidence upon which to base such charge, as follows:

79 "By the law in force at the time this letter power of attorney purports to have been transferred to Samuel May Wil-

liams (April 3d, 1873), authorizing him to solicit title to and take possession of said eleven leagues, and at the time said Blanco made his deed to Laguerenne Blanco could have procured, if he desired, and retained in his possession, a legal copy of the power of attorney, which would have all the force and effect of the original." (Transcript, p. 53.)

6th. In charging the jury upon the legal effect of the evidence tending to sustain the genuineness of said power of attorney, claimed by plaintiff in error to be forged, to wit:

"The defendants introduced testimony tending to show that as early as 1838 Hammekin had placed in his possession the deed from Blanco to Laguerenne referring to such a power of attorney; that he insisted on having an authenticated copy of said power furnished him; that very soon thereafter he received said copy of said power, which he placed (with other title papers) in the hands of his agent, retaining a copy made by said Hammekin, which copy has been given you, declared by the interpreter to be identical (with immate-
80 rial exceptions) in terms with the letter power offered by the defendants; that Hammekin had placed the testimonio in the land office as required by law of persons having such evidence of title to land in Texas; that said Hammekin paid the government dues on said grant, had paid taxes, had sent agents on the land as early as the growing settlement of the country so far freed this section of the country from the hostile Indians, as permitted its occupancy and the assertion of ownership by assuming actual control of it; and that Hammekin and those to whom he conveyed, and the defendants claiming under them, had continued to assert ownership to these lands under said power of attorney; and if, in your judgment said proof establishes such facts, and the proof as to the age and custody of the said letter power satisfies you that said paper is as old as its date imports, and has been in the custody that said evidence indicates, you may consider this proof equal to the direct testimony of at least one witness to the signature of Miguel Rabago; and unless in your judgment the evidence of plaintiff's witness and all the circumstances of these parties and these translations, as shown by all the testimony, proves that Miguel Rabago did not sign said
81. letter power, you will find said letter power to be genuine and return your verdict for the defendants." (Transcript, p. 54.)

7th. In charging the jury upon the legal effect of the said power of attorney, claimed by plaintiff in error to be forged and even, if genuine, then invalid for lack of proper execution and authentication, as follows, to wit:

"But the defendants say that Miguel Rabago himself in his lifetime sold these lands, and that by mesne conveyances the defendants hold said Rabago's title by purchase and regular transfer, and are thus themselves the owners of these lands; and in tracing their title the defendants offer, after the grant to Rabago, upon which both parties rely—

"1st. A paper purporting to be a letter power of attorney from said Miguel Rabago to Victor Blanco and—

"2nd. A deed by Victor Blanco, assuming to act as attorney of Rabago, to William Laguerenne, and by mesne conveyances from Laguerenne to the defendants. And if all of these papers are genuine, they do conclusively show that Rabago did part with his title to these lands in his lifetime, and no right to them could pass to his heirs
82 by descent and the plaintiff —— no right by his purchase from Mrs. Cortez, and therefore must fail to recover in this suit, and the defendants, by reason of their right thus acquired without the aid of compassion and prejudice, are shown to be entitled to retain the lands, and must receive your verdict in their favor." (Transcript, p. 59.)

8th. (1st.) In submitting to the jury the "Hammekin copy" of the said pretended power of attorney (Transcript, p. 40) for any purpose, it being a copy of a copy taken from a record copy. (Transcript, pp. 59 & 60).

(2nd). In refusing to charge the jury, as asked by plaintiff in error, upon the legal effect and purpose of said "Hammekin copy" of said pretended power of attorney as follows, to wit:

"The jury is instructed, by request of plaintiff, that the copy of the copy of the power of attorney said to have been in the possession of Hammekin goes to the jury only for the purpose of showing that he had such a paper in his possession, and cannot be relied on as a muniment of title by the defendants." (Transcript, p. 61.)

9th. (1st.) In submitting to the jury copy of the deed from
83 Victor Blanco to Guillermo Laguerrenne, dated city of Mexico, May 25th, 1836, (Transcript, pp. 64 to 68), and copy of the power of attorney from Guillermo Laguerrenne to Francisco Priolland (Transcript, pp. 68–70), both of which are copies purporting to be duly certified and examined copies of original records in the proper offices of the notaries, Landgrave and Ferreira, of the city of Mexico, claimed by plaintiff in error not to be so proven. (Transcript, p. 71.)

(2nd.) In refusing to instruct the jury upon the recital in said deed from Blanco to Lagurenne touching the pretended power of attorney from Rabago to Blanco, as contrasted with the evidence of witness, W. H. Williams, for defendant in error, to the effect that at the time the said deed from Blanco to Laguerrenne was executed in the city of Mexico, to wit, 25th May, 1836, the power of attorney was in Texas (Transcript, p. 37), the said deed reciting that at that time the power was in the city of Mexico (Transcript, p. 74), and exhibited to the notary Bonilla and by him returned to Victor Blanco:

"To the jury: (1st.) You are instructed, at the request of
84 plaintiff, that in considering the authority under which Blanco sold to Laguerrenne in May, 1836, the notaries, recital that he returned the power of attorney to Blanco is true, and the defendants are estopped from denying the fact; and in this connection—

"(2nd.) You are further charged that in order to find for the defendants, you must believe that the power of attorney under which the sale was made to Laguerrenne by Blanco is the same which was

presented to you in evidence as having been found in the trunk of Samuel May Williams" (Transcript, p. 71); and

10th. In refusing to instruct the jury upon the issue raised by the evidence tending to show the alienage of Larguerrenne at the date of the deed to him, the charge asked by plaintiff in error being as follows:

1st. "The jury are instructed, at the request of the plaintiff, that on the 25th day of May, 1836, at the date of the deed from Blanco, as attorney in fact for Miguel Rabago, 'no alien could hold land in Texas,' and a deed to an alien would have been null and void.

2nd. "If you believe from the evidence that Laguerrenne, to
85 whom Blanco purported to sell, was an alien to Texas, and a resident citizen of the city of Mexico, then you are further instructed that you must consider such sale invalid, and a nullity, and you will find for the plaintiff." (Transcript, p. 73.)

11th. Counsel for defendant in error in argument to the jury referred to this identical case on former trial before the supreme court of Texas, and stated that it was there decided that the latter power of attorney alleged to be the genuine and valid act of Rabago was an ancient instrument, and that Blanco could have procured a copy of it when he sold to Laguerrenne. (Transcript, p. 75.)

Wherefore the said D. H. Williams, plaintiff in error, prays that the judgment herein against him may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of said payment.

HERRING & KELLY,
JAMES M. ANDERSON,
EUGENE WILLIAMS,
For Pl'ff in Error.

Endorsed on cover: N. Texas C. C. U. S. No. 1081. D. H Williams, plaintiff in error, *vs.* Edward D. Conger, W. H. Smith, W. C. Talbert, Thomas Harrison, James Sadler, Henry E. Conger for himself and as executor and guardian; Mary A. Conger, P. McCormick; Charles C. Conger, Ralph E. Conger, and Newton A. Conger. Filed 15th October, 1884.

125-397

NO. 1081. (DOCKET OF 1884.)
NO. 105. (DOCKET OF 1887.)

FILED
OCT 10 1887
JAMES H. McKENNEY,
CLERK.

IN SUPREME COURT OF THE UNITED STATES.

D. H WILLIAMS
vs.
E. D. CONGER, *ET AL'S.*

PHILADELPHIA BAR ASSOCIATION

ON ERROR

FROM THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AT WACO.

BRIEF OF PLAINTIFF IN ERROR.

EUGENE WILLIAMS,
of counsel for D. H. WILLIAMS,
Plaintiff Below and in Error.

NO. 1081. (DOCKET OF 1884.

NO. 105. (DOCKET OF 1887.

D. H WILLIAMS
vs.
E. D. CONGER, *ET ALS.*

IN SUPREME COURT OF THE UNITED STATES.

ON ERROR
FROM THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AT WACO.

BRIEF OF PLAINTIFF IN ERROR.

EUGENE WILLIAMS,
of counsel for D. H. WILLIAMS,
Plaintiff Below and in Error.

CONTENTS.

References to Transcript, Marginal Page.	*Trans.*	*Brief.*
Statement	8	1
Title	9	1
Plaintiffs	9	1
Defendants	9	1
Note		1
Specifications of Error		2
Assignment of Errors	75	2
1st—On Rabago's application	10	5
1st Prop.—Irrelevancy	28	6
2d Prop.—Archives	28	7
3d Prop.—Proof Foreign law	28	9
1st Sub., 1st Prop., 9th Ass'gn't	65	9
Copies Blanco deed, etc	62	
4th Prop., 1st Assgt	28	9
Comparison of hands	28	9
1st Sub.—Not required to be signed by Rabago	18	10
2d Assignment	30	10
Refused Ch. Comp. Hands	30	10
2d, 3d and 4th Sub., 4th Prop., 1st Assgt	28	11
Grounds of Exception	28	11
Texas rule		12

	Trans.	Brief.
U. S. Court rule		12
Common Law Rule		12
Two exceptions		12
First		12
Second		13
Argument Comp. Hands		16
Third Assignment	31	19
Ch. Court erroneous on	31	19
Comp. Hands	31	19
1st Prop.—Weight Ev.	32	19
2d Prop.—For court and not jury	32	20
3d Prop.—Not proven genuine	32	20
Fourth Assignment	32	21
Old Trunk Power	44	21
1st Prop. } Requisites	47	23
2d Prop. } Requisites	47	23
3d Prop. } Requisites	47	23
1st Sub.—Not claimed under	47	23
2d Sub.—Suspicions	47	25
3d Sub.—Improper custody	47	26
Argument		26
4th Prop., 4th Assgt	47	32
Invalid for want of form	47	33
1st, 2d and 3d Subs., 4th Prop.	47	33
5th and 6th Props.—Not urged	47	35
7th, 8th and 9th Prop.—Power cancelled	47	35
10th Prop.—Req. verbal sale	47	37
5th Assignment.—"Legal copy"	47	37
2d Prop. 9th Assgt.—Charge on trunk power	65	38
1st Prop., 5th Assgt	48	38
2d Prop., 5th Assgt	48	38
6th Assignment.—Ch. Ct.	48	41
7th Assignment.—Ch. Ct	53	43
8th Assignment.—"H. copy"	53	44
1st Prop.	54	44
2d Prop.—Ch. Ref.	55	44
9th Assignment —(Copies, Blanco and Prioland)	55	46
1st Prop.	65	46
1st Sub., 1st Prop	65	46
2d Sub., 1st Prop	65	46
2d Prop. *ante*, 5th Assgt	65	38
10th Assignment.—Alienage	66	48
Statement	66	48
Authorities		49
Argument		49
Summary		53

No. 105 (1081.)

D H. WILLIAMS *vs.* E. D. CONGRE, *et als.*

IN THE SUPREME COURT OF THE UNITED STATES.

ON ERROR

From the Circuit Court for the Northern District of Texas, at Waco.

BRIEF OF PLAINTIFF IN ERROR.

Statement.

By petition filed September 11, 1873, in the State District Court, D. H. Williams, plaintiff in error, brought this action to recover the Miguel Rabago grant of eleven leagues of land situated in McLennan county. On July 25, 1879, the case was removed to the United States Circuit Court, and upon hearing at the April term, 1884, verdict and judgment were for defendants, from which this writ is prosecuted by plaintiff below.

The Title.

Both parties claim through Miguel Rabago, who held by grant from the State of Coahuila and Texas, of date January 13, 1834, and who died September 24, 1848, his wife surviving him.

The plaintiff claims through the widow of Miguel Rabago by deed from her, dated July 26, 1873; she being at that date his sole heiress.

This title the defendants deny only by attempting to show that Rabago sold the land to their vendor, Laguerenne, by a purported deed, of date City of Mexico, May 25, 1836.

The defendants claim:

1. Through a letter power purporting to have been executed by Rabago to Victor Blanco, his uncle, of pretended date, June 8, 1832. (Trans., p. 44.)

2. A copy of the deed purporting to have been executed by Blanco as attorney for Rabago to Guillernno Laguerenne. (Trans., p. 58.)

3. A copy of power of attorney from Laguerenne to Francisco Priolland. (Trans., p. 62.)

4. Mesne conveyances to defendant.

NOTE.—This cause has been pending since 1873 and has been once on appeal to the Supreme Court of Texas. (49 Texas, 582.) The opinion there rendered is based upon presumptions not supported by the record, and, upon consideration, will evidence the difficulties surrounding the plaintiff's efforts to obtain a fair and impartial hearing of his claim in the local courts.

He comes to this forum and with respect prays a close investigation of the record as contrasted with the imaginary case made out for the defend-

ants by the Supreme Court of Texas (49 Texas, 582), confident that, far removed from local prejudice, a full and honest exposition of the law of this case will be rendered, based upon authority and the record upon which the plaintiff confidently relies for a judgment of reversal and for final success.

SPECIFICATION OF ERRORS:

The *First*, *Second* and *Third* arise upon a pretended application by Rabago to Gov. Viesca, dated November 28, 1828, and the latter's concession endorsed thereon, December 2, 1828. (Trans., p. 26.)

The *Fourth*, *Fifth*, *Sixth*, *Seventh* and *Eighth* upon a pretended letter power of attorney by Rabago to Blanco, and an endorsement thereon by Blanco to Samuel May Williams (Trans., p. 44), and *a copy of a pretended copy* of a letter power similar thereto. (Trans. pp. 35-53.)

The *Ninth* upon a pretended deed from Rabago, by Blanco, to Laguerenne, dated May 25, 1836 (Trans., p. 58), and a power of attorney from Laguerenne to Priolland. (Trans., p. 62.)

The *Tenth* upon the issue of Laguerenne's alienage to Texas on May 25, 1836, and his consequent inability to take title to land in Texas.

Assignment of Errors

In full are as follows (Trans., p. 76): "The court below erred—

"*First*. In allowing to the jury the pretended application of Miguel Rabago to Viesca, the Governor of the State of Coahuila and Texas, for eleven leagues of land, and the pretended concession of Viesca, granting the prayer; and especially did the court err in submitting these papers to the jury for the purpose of comparing the handwriting thereof with the pretended signature of Miguel Rabago to the pretended power of attorney from Miguel Rabago to Victor Blanco, claimed by the plaintiff in error to be forged.

"2. In refusing to submit to the jury the following charge asked by plaintiff in errar to control them in their consideration of said pretended application and concession, after its introduction over protest of plaintiffs in error:

"The jury are instructed, at the request of the plaintiff, that a paper has been introduced by defendants purporting to be the original concession of Governor Viesca to Miguel Rabago, and that it has been commented on in the argument as containing the original signature of Miguel Rabago. In this connection you are charged that at the date of such signature the law did not require the same to be signed by Rabago, and that the concession goes to you for your consideration as one of the links in the chain of defendant's title, and not for the purpose of comparison of handwriting; and you will not in your deliberations conider such signature as the signature of Miguel Rabago, for the purpose of comparison of handwriting."

"3. In charging the jury upon the legal effect of said pretended application and concession, as follows:

"The defendants hav also offered a paper; which purports to be the original application of Miguel Rabago for this concession, which purports

to be signed by Rabago in person—that is, by himself—and have offered proof to the effect that this paper came from the archives at Saltillo, which is the proper custody for said original application and decree, and to the effect that the signatures of Governor Viesca, and of the secretary are genuine, with proof as to the circumstances of the finding said paper and manner of keeping such archives; and if you believe from the proof that said paper so offered by the defendants, is as old as its date imports, that it has been preserved in the archives as the initial paper connected with this grant, you may give these circumstances the benefit of direct testimony to the genuiness of said signature; and if the other proof in the case does not, in your judgment, overbear this weight, you may find the signature to this original application to be the proved signature of Miguel Rabago, and use it as a standard of comparison to aid you in determining the genuineness of the signature to the writing purporting to be a letter power from said Rabago to Victor Blanco.'

"4. In submitting to the jury the pretended power of attorney from Miguel Rabago to Victor Blanco, authorizing the latter to sell the land in question, through which defendants in error claim as against the vendee of the heir of the said Miguel Rabago, plaintiff in error.

"5. In charging the jury upon the right of Blanco to get a copy of said pretended power, there being no evidence upon which to base such charge, as follows:

"'By the law in force at the time this letter power of attorney purports to have been transferred to Samuel May Williams (April 3, 1833), authorizing him to solicit title to and take possession of said eleven leagues, and at the time said Blanco made his deed to Laguerenne, Blanco could have procured, if he desired, and retained in his possession, a legal copy of the power of attorney, which would have all the force and effect of the original.'

"6. In charging the jury upon the legal effect of the evidence tending to sustain the genuineness of said power of attorney, claimed by plaintiff in error to be forged, to wit:

"'The defendants introduced testimony tending to show that as early as 1838 Hammekin had placed in his possession the deed from Blanco to Laguerenne referring to such a power of attorney; that he insisted on having an authenticated copy of said power furnished him; that very soon thereafter he received said copy of said power, which he placed (with other title papers) in the hands of his agent, retaining a copy made by said Hammekin; which copy has been given you, declared by the interpreter to be identical (with immaterial exceptions) in terms with the letter power offered by defendants; that Hammekin had placed the testimony in the land office as required by law of persons having such evidence of title to land in Texas; that said Hammekin paid the government dues on said grant, had paid taxes, had sent agents on the land as early as the growing settlement of the country so far freed this section of the country from the hostile Indians as permitted its occupancy, and the assertion of ownership by assuming actual control of it; and that Hammekin and those to whom he conveyed, and the defendants claiming under them, had continued to assert ownership to these lands under said power of attorney; and if, in your judgment, said proof establishes such facts, and the proof as to the age and custody of the said letter power satisfies you that said paper is as old as its date imports, and has been in the custody that said evidence indicates, you may consider this proof equal to the direct testimony of at least one witness to the signature of Miguel Rabago; and unless in your judgment the evidence of plaintiffs' witness and all the circumstances of these parties and these translations, as shown by all the testimony, proves that Miguel

Rabago did not sign said letter power, you will find said letter power to be genuine and return your verdict for defendants.

"7. In charging the jury upon the legal effect of said power of attorney claimed by plaintiff in error to be forged, and even if genuine, then invalid for lack of proper execution and authentication, as follows, to wit:

"'But the defendants say that Miguel Rabago himself, in his lifetime, sold these lands, and that by mesne conveyances the defendants hold said Rabago's title by purchase and regular transfer, and are thus themselves the owners of these lands; and in tracing their title the defendants offer after the grant to Rabago upon which both parties rely:

"'1. A paper purporting to be a letter power of attorney from Miguel Rabago to Victor Banco; and—

"'2. A deed by Victor Blanco, assuming to act as attorney of Rabago, to William Laguerenne, and by mesne conveyances from Laguerenne to defendants. And if all these papers are genuine, they do conclusively show that Rabago did part with his title to the lands in his lifetime, and no right to them could pass to his heirs by descent; and the plaintiff took no right by his purchase from Mrs. Cortez, and therefore must fail to recover in this suit, and the defendants, by reason of their right thus acquired without the aid of compassion and prejudice, are shown to be entitled to retain the lands, and must receive your verdict in their favor'

"8. (1.) In submitting to the jury the 'Hammekin copy' of the said pretended power of attorney, for any purpose, as being *a copy of a copy* taken from a record copy.

"(2.) In refusing to charge the jury, as asked by plaintiff in error, upon the legal effect and purpose of said 'Hammekin copy' of said pretended power of attorney as follows, to wit:

"'The jury is instructed, by request of plaintiff, that the copy of the power of attorney said to have been in the possession of Hammekin goes to the jury only for the purpose of showing that he had such a paper in his possession, and can not be relied on as muniment of title by defendants'. (Trans., p. 55.)

"9. (1.) In submitting to the jury copy of the deed from Victor Blanco to Guillermo Laguerenne dated City of Mexico, May 25, 1836, and copy of the power of attorney from Guillermo Laguerenne to Francis Priolland, both of which are copies purporting to be duly certified and examined copies of original records in the proper offices of the notaries, Landgrave and Ferreira, of the City of Mexico, claimed by plaintiff in error not to be so proven.

"(2.) In refusing to instruct the jury upon the recital in said deed from Blanco to Laguerenne, touching the pretended power of attorney from Rabago to Blanco, as contrasted with the evidence of witness, W. H. Williams, for defendant in error, to the effect that at the time the said deed from Blanco to Laguerenne was executed in the City of Mexico, to wit, May 25, 1836, the power of attorney was in Texas, the said deed reciting that at that time the power was in the City of Mexico, and exhibited to the notary Bonilla and by him returned to Victor Blanco.

"To the jury: (1.) 'You are instructed, at the request of the plaintiff, that in considering the authority under which Blanco sold to Laguerenne in May, 1836, the notary's recital that he returned the power of attorney to Blanco is true, and the defendants are estopped from denying the fact, and in this connection—

"(2.) 'You are further charged that in order to find for the defendant, you must believe that the power of attorney under which the sale was made to Laguerenne by Blanco is the same which was presented to you in evi-

dence as having been found in the 'trunk of Samuel May Williams.'

"10. In refusing to instruct the jury upon the issue raised by the evidence tending to show the alienage of Laguerenne at the date of the deed to him, the charge asked by plaintiff in error being as follows:

"1. 'The jury are instructed, at the request of the plaintiff, that on the twenty-fifth day of May, 1836, at the date of the deed from Blanco, as attorney in fact for Miguel Rabago, 'no alien could hold land in Texas,' and a deed to an alien would have been null and void.'

"2. 'If you believe from the evidence that Laguerenne, to whom Blanco purported to sell, was an alien to Texas, and a resident citizen of the City of Mexico, then you are further instructed that you must consider such sale invalid, and a nullity, and you will find for the plantiff.'

"11. Not relied on."

First Assignment of Error:

The court erred in allowing to the jury the pretended application of Miguel Rabago to Viesca, the Governor of the State of Coahuila and Texas, and the pretended concession of Viesca (Trans. p. 23-30); and especially did the court err in submitting these papers to the jury for the purpose of comparing the handwriting thereof with the pretended signature of Miguel Rabago to the pretended power of attorney from Miguel Rabago to Victor Blanco (Trans. pp. 44 and 51), claimed by the plaintiff in error to be forged. 2r p. 28.

This pretended application and concession are as follows (Trans. p. 25):

Translation.

(Seal of Coahuila and Texas.)

Petition of Don Miguel Rabago for the purchase of eleven leagues of land in the Department of Bexar. December 1st, 1828.

3d seal. Two reals. Issued by the State of Coahuila and Texas for the years 1828 and 1829.

MOST EXCELLENT SIR: The citizen, Miguel Rabago, resident of the valley of Santa Rosa, with due respect, represents to you, that needing land for agricultural and raising of stock, he begs you that by virtue of your authority you will be pleased to sell him eleven leagues of land on the margins of the Trinity river in the Department of Bexar, or in the section which shall appear to me to be the most convenient and best adapted to my interests, being altogether or in different localities, offering to settle and cultivate said lands within the time prescribed by the colonization laws of the State of the 24th of March, 1825. Also, that you will be pleased to grant me the time designated by the said law to pay the dues on the said land. I ask your excellency that you will be pleased to refer my petition, for which I will be thankful.

Leona Vicario, 28th of November, 1828.

(Signed) MIGUEL RABAGO.

LEONA VICARIO, *2nd of December*, 1828.

Conformable to article 24 of the colonization laws of the 24th of March, 1825, I sell to the petitioner the eleven leagues of land he asks for of the

vacant lands in the Department of Texas, in the part he may point out, or in the locality most suitable to him. The commissioner whom the government will appoint will place him in possession of said leagues, and will extend the necessary titles, previously classifying the class and quality of said lands as a guide of the amount to be paid to satisfy the government dues, for which payment I grant him the time designated by the 22d article of said colonization law. A copy of the petition and decree will be given to the party, intended for his observance and the subsequent effects.

(Signed) VIESCA.
SANTIAGO DEL VALLE.

(Endorsements and Certificates.)

E. M. PEASE.
Saltillo, August 9, 1881.
(Signed) JOSE MARIA MUSQUIZ.

A. NEIL.
Saltillo, August 9, 1881.
ESTEBAN PORTILLO.

The citizen, Licentiate Jose Ma. Musquiz, Secretary of the government of Coahuila de Zaragosa, certifies that the annexed document is the original which exists in the archives of the government of Coahuila relative to the concession of eleven [leagues] of land made to Don Miguel Rabago, in the Department of Bexar, on the 2d of December, 1828. And at the request of the applicant this document is given, with the obligation of returning it when the suit in which it is used shall be terminated.

Saltillo, April 6, 1881.
[SEAL.] (Signed) JOSE MA. MUSQUIZ, *Sec'y.*

First Proposition, First Assignment.

This application and concession, if genuine, are irrelevant to any issue to be tried. (Trans. p. 28.)

Statement.

An "exact counterpart" of this application and concession was introduced by the defendant as a part of the *testimonio of title* (Bee's testimony, Trans. p. 30) and by the plaintiff as part of his translated land office copy (Trans. p. 10-11) of the *protocol of title*. This paper was the third copy of the application and concession in evidence.

"Plaintiff and defendants agree that the lands * * at one time belonged to Rabago." "The grant to Rabago upon which both parties rely." (Trial judge's charge, p. 49.) It is true the defendants offered it as part of their title (Trans., bot. p. 22), yet in submitting the issues to the jury, the trial judge tells the jury that they may "use it as a standard of comparison to aid you in determining the genuineness of the signature to the the writing purporting to be a letter from Rabago to Victor Blanco." (Trans., p. 51) It is nowhere referred to in the charge as a part of defendant's title or for any purpose than comparison of hands.

Authorities.

Hazleton v. Union Bank, 32 Wis. 48.

It is argued that a writing offered should have been received in evidence

as tending to prove that when the same was executed, Buchanan owned the Hargrave notes and mortgage. It is not disputed that Buchanan owned the Hargrave note and mortgate when the same were executed, hence the writing was irrelevant, *this issue being admitted*. The writing could not be used as a standard of comparison.

1 Wh. Ev. (2 ed.), §717.

"By Mr. Best the reasons for the exclusion of this form of testimony have been summed up as follows:

"1st. That the writings offered for the purpose of comparison might be spurious (as this paper is claimed by the plaintiff to be), and consequently that before any comparison between them and it could be instituted a collateral issue must be tried to determine their genuineness, to the great distraction of the attention of the jury and delay in the administration of justice."

Argument.

This paper contains a signature pretended to be Rabago's. The defendants wish a comparison of lands to rebut the plaintiff's evidence of forgery and introduce it for this purpose, which is inadmissible unless relevant and in evidence or an ancient writing.

To say this paper is introduced to prove any issue except hand writing is puerile, and needs only a plain statement of the facts to show its absurdity.

Second Proposition, First Assignment.

The paper, if genuine and an archive, can be brought into court only by its lawful custodian, or by a lawfully certified or examined copy.

Statement.

It was introduced as an exhibit attached to the deposition of Musquiz and Portillo. (Trans., pp. 18, 19.) Musquiz first saw it in January, 1881; he gave it to Willet, who had it photographed. (Trans., p. 22.) In April, 1881, Willet again took it from Musquiz, who claims to be its legal custodian, and left a bond for its return, sending it from Saltillo, Mexico, by mail to E. H. Graham, Waco, Texas, who carried it to San Antonio in June or July, 1881, where Willet again, and for the last time, saw the paper. (Trans., p. 22.) On the 9th of August, 1881, the depositions of Musquiz and Portillo were taken in Saltillo, to which is attached what, after various and uncertain custody, they undertake to identify as an archive of their office. (Trans., p. 19.) This paper could not be found in the office by the chief clerk in 1874. (Trans., p. 29.)

Authorities.

A duly certified copy of the original in the hands of its lawful custodian is proof of an archive. 2 Ed. 1 Whar. Law of Ev., p. 111, sec. 107 and sec. 828.

The court will order the keeper to bring the archive. Smith v. Townsend, Dallam, Texas Rep., 571.

The chief clerk produced the original. Houston v. Perry, 5 Texas, 464.

Necessity requires proof of originals by transcript, *the records must stay in the custody* of their keeper, and copies only can be used. Wallace v. Beauchamp, 15 Texas, 306.

Documents on file which public policy requires should not be removed. Leathers v. Reading Co., 2 Words, 680.

"It is clear that the original files, if offered in evidence, should have been proved to be such by the testimony of the *legal custodian summoned to attend and bring them*, or that a copy certified by such custodian as a true copy should have been introduced." Phelps v. Hunt, 43 Conn., 194.

It would seem clear here (Luco v. United States, 22 How.), also the original were public archives which could not be produced. Elvin v. Zimpleman, 47 Texas, 520.

If the original remaining archive were within our territorial limits he could not produce it. It would be the property of a publice office, not subject to his disposition, and he could at best be but entitled to a certified copy. Edwards v. James, 7 Texas, 378.

The record itself is produced only where the cause is in the same court whose record it is, etc. 1 Gr. Ev., sec. 502.

Law 13, Title 10, Lit. 11 Nov. Rec. declares that originals from notaries' offices and other archives cannot be removed.

Escriche Instrumento Publico, p. 893, is to same effect; stating the law of Mexico.

Argument.

A paper out of the registry ceases *ipso facto* to be an archive—it is competent evidence only as an archive. It is an archive by reason of its custody, and the courts hold this custody in such esteem that they abrogate the rule and do not require the production of the original because the best evidence is best preserved by respecting the sancitity of its custody as an archive. If the original is needed the courts will not receive it except in its proper custody—the hands of its keeper. 1 Whar. Ev., 43 Conn., *supra.*

This paper illustrates the rule. No one testifies to its genuineness—it stands alone upon its character as an archive. After a twenty days' search, the chief clerk of the office, in 1874, found the ~~letter~~, but could not find this paper. Yet upon a casual search, and a $500 reward to a resident of the city in which it is pretended to have been found, it appeared among the papers of the office out of its regular files. From that time this employee of the defendants had full control of this paper deemed so sacred in law as to stand upon its own character, making at least two journeys during a period of seven months; passing from one government to a foreign jurisdiction, it was at last presented to its pretended custodians. There is no file mark upon it by which the custodian could have identified it as the paper borrowed from him by Willett.

Archives should be protected from such abuse.

If this paper can go to the jury for any purpose, it should be brought into court in the hands of its legal custodian.

Should the plaintiff need a copy of this paper so as to introduce it in evidence as a part of his title, how could he get such copy properly authenticated at this time? He has the same right and need for its contents as the defendants. Yet, they have a monopoly of its use, and it is impossible for a certified copy to be had. This paper should have been brought into court by the keeper of the archives.

The witness Musquiz says he allowed the defendants to have it by order of the Governor, and that the law of Coahuila allowed such a proceeding. (Trans., p. 19.)

Law 13, Title 10, Lib. 11 Nov. Rec., declares that originals from notaries offices and *other archives* cannot be removed Whether the $500 paid

Willet (Trans., p. 22) by defendants had any influence upon Law 13, is not stated in the record.

Third Proposition under First Assignment.

Musquiz says he held this paper by the laws of his country, and especially the act of February 16, 1870. If so, the law should be proven as other foreign laws. (Trans., p. 18.) - 2 8

Statement.

The paper is introduced upon its integrity as an archive. This character depends upon the law constituting it an archive, which law in this case is the written law of 1870, of which our courts do not take judicial knowledge, hence the law should be proven.

First Sub-Division, First Proposition, Ninth Assignment, Will be here considered.

The notary who purports to hold the record of the deed from Blanco to Laguerenne says he holds it by virtue of the law of the 29th of November, 1867 (Trans., p. 56), and, if so, he should show by a duly authenticated copy of the law that his is the legal custody. 2 p. 60

Statement.

"I received said records personally from the hands of Bonilla, in accordance with the law of November 29, 1867." (Trans., p. 56.)

Authorities.

Strother v. Lucas, 6 Peters. 768, *supra*: "The court cannot be charged with knowledge of foreign laws."

Martin v. Payne, 21 Texas, 295, says: "This depended on written law and cannot be established by parol evidence."

Ennis v. Smith, 14 Howard, 426, says: "The written foreign law may be proved by a copy of the law properly authenticated, but not by parol."

Church v. Hubert, 2 Cranch, 236, says: "Nor can it be presumed any difficulty exists in obtaining a copy."

Vandevan v. Smith, 2 Cai, (N. Y.) 155, says: "It must appear the keeper has official custody.

Argument.

It may be the laws cited do not bear the construction placed upon them by the witness. The law should be proven to our courts by legal evidence so that we may know the charcter of the paper sought to be introduced as an archive.

Since 1881 this application has been out of proper custody, yet the law of 1870 exists on the statute books of Coahuila. Is this paper an archive under the law of 1870? If so, how does this court know the fact? We have no proof of the law of 1870. Yet Vandevan v. Smith, *supra*, says *it must appear the keeper had official custody.*

Fourth Proposition, First Assignment.

The pretended application of Rabago is objected to for the purpose of comparison of handwriting. (Trans., p. 28.)

Statement.

The trial judge charged the jury upon finding certain facts, to "use this signature" as a standard of comparison, to aid in determining the genuineness of the signature to the writing purporting to be a letter power from said Rabago to Blanco. (Trans., p. 51.)

This raises a collateral issue upon which the entire trial is made to turn and which consumes twenty-two pages of the record. (Trans., p. 10-32.) It becomes the issue in the case, a collateral one arising upon the genuineness of a signature irrelevant to the issues upon which the title rests.

First Sub-Division, Fourth Proposition, First Assignment.

This application was not required by law to be signed by Rabago.

(Here will also be considered second assignment.)

Second Assignment.

The court erred in refusing to charge the jury as requested by plaintiff in error as follows (Trans., p. 30):

"The jury are instructed, at the request of the plaintiff, that a paper has been introduced by the defendants purporting to be the original concession of Governor Viesca to Miguel Rabago, and that it has been commented on in the argument as containing the original signature of Miguel Rabago. In this connection you are charged that at the date of such signature the law did not require the same to be signed by Rabago, and the concession goes to you for your consideration as one of the links in the chain of defendant's title, and you will not in your deliberations consider such signature as the signature of Miguel Rabago for the purpose of comparison of handwriting." (Trans., p. 30).

Statement.

"The defendants next offered in evidence *as a part of their title* * * * the purported application of Miguel Rabago." (Trans., p. 22.) No evidence whatever is introduced that this paper is in Rabago's handwriting. (See all the record.) Much evidence is shown in the record on the issue of this paper, the plaintiff showing it was not in the archives in 1874, and not found after *twenty day's search.*

The paper was objected to because not known to have been Rabago's act, and a charge asked instructing the jury that the law did not require his signature.

Authorities.

In White v. Holliday, 11 Texas, 607, is found the form of a grant in which it appears that the application was made by an attorney in fact, where authority was verbal, and who signs the application in his own name, and nor that of his principal, yet, upon the application the title issued and was held valid.

Argument.

If the law only required an application to be signed by an agent for Rabago, as an archive it could offer no test for the comparison of hands.

In White v. Holliday, the agent appeared by verbal authority and signed application. Can we know by whom the application of Rabago was signed? No proof is offered of the handwriting. Its age and custody—facts altogether consistent with its being signed by Rabago's agent, are presented by the court to the jury as evidence of *Rabago's* handwriting. The jury are left to presume that by the law then in force the paper was required to be signed by the applicant in person.

The plaintiff's rights demand that the jury be informed of the law not requiring Rabago to sign the application.

Second Sub-Division, Fourth Proposition, Fourth Assignment.

There is no evidence that Rabago wrote or signed it. R. p. 28

Third Sub-Division, Fourth Proposition, First Assignment.

It is not *admitted* or *clearly* proven to contain the genuine signature of Rabago. R. p. 28

Fourth Sub-Division, Fourth Proposition, First Assignment.

The instrument with which it was compared is not so old but that the living witnesses could have been, and *were, actually* introduced. R. p. 28

These three sub-divisions will be best considered with each other.

Statement.

The trial judge's charge shows that the application was not proven or admitted to be the genuine signature of Rabago, and summing up the evidence shows only one vague fact as the basis upon which this paper must stand or fall—its pretended character as an archive (Trans. p. 54); it further shows that *there were introduced a number of living witnesses who testified they were acquainted with the handwriting of Miguel Rabago*, from having seen him write and noticed his manner of signing his name and making his rubric (Trans., p. 50), and the witness Flores testified for the plaintiff. (Trans., p. 29).

"I (Ramon L. Flores) live in Saltillo, and was chief clerk * * of the office of the Secretary of State. I knew Jesus Borego. He asked for search to be made for documents relating to the *concession* made to the deceased Miguel Rabago for the purpose of regaining the land. He came for plaintiff in this cause. I searched *all documents*. This was in the fall of 1874. I made the search and nobody helped me; it took me about 20 days, and I did it with the utmost care. * * * I found the original grant * * not the concession * * . The search was made in all the archives, completely examining all the papers, and was not confined to the files of 1828. I made it with all the care possible and spent 20 days, more or less, in doing it."

Authorities—Texas Rule on Comparison of Handwriting

Handy v. Gandy, 28 Texas, 211, states the Texas rule to be as follows:

"It is believed the English rule enables the jury with more certainty to decide the matter in issue between the litigants."

Keneday v. Upshaw, 64 Texas, 420—decided in 1885—appears the rule as stated above.

Matlock v. Grover, 63 Texas, 236.

United States' Courts Rule.

Strother v. Lucas, 7 Peters, 767, says:

"It is a general rule that evidence by comparison of hands is not admissible."

Moore v. United States, 91 U. S. (1 Otto), 270, 274.

English or Common Law Rule.

In McPherson v. Hughes, Peak's N. P. 29, Lord Kenyon said: "Comparison of hands is no evidence."

In Mudd v. Sackermoore, 5Ad and 3E, 703, this rule is fully recognized.

Jumperty v. People, 21 Ill., 414, states the rule:

"The genuineness of handwriting can not be proved or disproved by allowing the jury to compare it with the handwriting of a party proved or admitted to be genuine."

Jackson v. Phillips, 9 Conn. 94 and 112, says:

"The rule is settled in England, and I believe in this State, that comparison of hands by juxtaposition of the writings in order to ascertain whether both were written by the same person, is inadmissible."

The English rule has been changed in Texas in criminal cases. (Code Criminal Pro., 667), but not in civil cases, as is shown by Keneday v. Upshaw, 64 Texas, 420, decided in 1885; Eborn v. Zimpleman, 47 Texas, 518, which declares the common law to be the rule in civil cases.

So also, Matlock v. Glover, 63 Texas, 236.

TWO EXCEPTIONS exist to this general rule, briefly stated, *first*, in the case of ancient writings; and *second*, when the standard is already in evidence.

First Exception.

The rule is—

First. Where writings are not old enough to be introduced to the jury as ancient instruments, proving themselves; *second*, yet are of such age that living witnesses can not be had; *third*, to produce other documents admitted to be genuine, or proved to have been respected and treated and acted upon as such by all parties; *fourth*, and to call experts to compare them with the handwriting to be proven; *fifth*, and to have the experts testify their opinion concerning the genuinenesss of the instrument in question.

2 Phillips Ev., 257.

Strother v. Lucas, 6 Peters, 765.

Only one living witness testified, but the court says:

"There may be cases where, from the antiquity of the writing, it being impossible for any living witness to swear that he ever saw the party write, comparison of handwriting with documents known to be in his handwriting has been admitted, but these are *extraordinary instances* arising from the necessity of the case, and which do not apply to the one before the court, for there were living witnesses examined," etc. Here only one living witness had testified.

2 Phillips' Ev., 257–258—

"Where the antiquity of a paper *renders it impossible* for a witness to swear he has seen the party write, it is sufficient that *the witness* should have become acquainted with the handwriting from other ancient writings, it is regular to lay *such ancient writings proven to be genuine* before *an expert* who shall form an opinion and testify thereto."

Brune v. Rollins, 7 East., 282, says:

"Comparison of handwriting has indeed been allowed in the proof of *very* ancient documents where, from lapse of time, no living person could have any knowledge of the handwrtiing from his own observation, but this has been allowed *from absolute necessity* and the impossibility of better evidence being adduced."

Woodward v. Speller, 1 Dana (Ky.), 25 Am. Dec., 139, says:

"In some cases where the antiquity of the writing renders it impossible for a living witness to prove he ever saw the party write, comparison is permitted. In Doe v. Tarver, R. and M., 143, Lord Tenterdon, and in another case, Lawrence, J., and in Brune v. Rollins 7 East., 282, LaBlanc, J., each allowed *a witness* to testify to the signatures of ancient writings after forming in his (the witness') mind a standard of comparison from observing other ancient, *unquestioned, genuine documents.*"

In Jackson v. Kipp., Anthony N. P., 105—

"The plaintiff offered a witness who had acquired knowledge of a handwriting by inspecting unquestioned, genuine signatures on ancient surveys."

Robert v. Kiles, 1 Leigh., 222—

"The exception goes no further than that where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write, comparison with the document known to be in his handwriting has been admitted."

Jackson v. Brooks, 8 Wendell, 420—

"From inspecting some deeds the witness had acquired a knowledge of the handwriting of the grantors and witnesses, and from such knowledge he testified to the genuineness of the signatures. The parties were all dead so long ago that no person living could have seen them write."

Grimes' case, 5 Ala., 747—

"This rule has been relied on when the writings are so ancient that they can not be proved by living witnesses, and *yet are not of such* age as to prove themselves."

Second Exception.

The rule is, comparison of hands may be made where—

1. Other writings *admitted or clearly* prove to be genuine.
2. Are already in evidence for *some other purpose.*

1 Gr'l. Ev., sec. 578 (1-2); 2 Phillips Ev., 256.

3. But if the proposed standard is already in evidence but not *admitted* or *clearly proven* genuine, the comparison cannot be made.

United States v. Damand, 3 Wall., Jr., 181.

Bragg v. Colwell, (post).

Bragg v. Colwell, 19 Ohio Stat., 412—

"Such a state of facts might estop Bragg as against certain parties from denying that the signature of his name to the Avery note was legally his, or that he was bound thereby, but it is not even an admission as against any one, that the signature to this note was in his own handwriting. The recitals of the mortgage and the language of the affidavit are both consistent with the idea that Bragg's name was signed to the note by another person by his direction, or under authority given by him, or it may have been so

written without authority, and subsequently been adopted and ratified by him."

The papers offered in evidence, and the facts proposed to be proved in connection therewith, tended strongly to prove that Bragg had admitted and recognized his signature to the Avery note as valid and binding on him. This he did not deny upon the trial, but did deny that the handwriting was his.

No evidence bearing on the question was offered by the plaintiff. It was the province of the court to determine whether the proposed standard of comparison had been fully shown beyond a reasonable doubt to be the handwriting of defendant. *So long as this remained in doubt* it was the duty of the court *not to allow the paper to go to the jury* or be exhibited to the witness as a standard of comparison."

Shannon v. Fox, 1 Cranch, C. Ct., 133:

Handwriting can not be proven by comparison with a power of attorney filed in the cause, there being no proof that the latter was actually signed by the party although he would be estopped from denying it.

Martin v. McGuire, 7 Gray, 177:

"The genuineness of a standard is not proven by introducing proof of the handwriting. Such testimony, although it might be properly competent upon the general question of the execution of the deed so as to authorize it to be read to the jury, yet fails to be sufficient to prove conclusively the handwriting of anybody, so as to make it competent to be used as a comparison of hands.

"By reading to the jury a mortgage the plaintiff did not render it admissible as a standard to be used by the defendant. The precise question seems to be, what was admitted by the plaintiff by reading to the jury the mortgage deed produced by defendant. Certainly he did not thereby admit that the body of the deed could not therefore be in the handwriting of any particular person, and the body of the deed could not therefore be admitted to be used as a standard. * * * nor did he admit the genuineness of the handwriting of the subscribing witness, nor necessarily that the signature to the deed was in the handwriting of the person whose name appeared as grantor therein. * * * We are of the opinion that the genuineness of the signature to the deed * * * was not sufficiently shown to authorize it to be used as a standard of comparison of handwriting by which to judge of the genuineness of the note in the suit, to secure which note the mortgage had been contemporaneously given."

Depue v. Place, 7 Pa. Stat., 428: "When both are doubtful and uncertain, comparison is not only useless as to any certain result, but clearly dangerous and more likely to bewilder than to instruct a jury."

Reed v. Spaulding, 41 N. H., 122: "It is only between signatures admitted to be genuine, and which are in evidence before the jury, that comparison is allowed."

In United States v. Domand, 3 Wall., Jr., 181 the customhouse registry was in evidence. The prosecution proposed to prove fraud by comparing two different signature to show they were made by *the same* person under different names.

This was permitted.

But, said Justice Grier: "If the evidence was offered to prove that *the prisoner* had made both these signatures, it would be incompetent, unless you had first an *acknowledged or proven* signature of the prisoner as a datum for a standard of comparison."

In Ebron v. Zimpleman, 47 Texas, 518, (citing 1 Cushing, 217), it is said "handwriting used as a standard must first be established by *clear and un-*

doubted evidence." Here competent witnesses had, by opinion evidence, established the standard, but this was held *not clear and undoubted* proof.

Tyler v. Todd, 36 Conn., 215: "No case has come to our knowledge in which the signature written by another party, or *a disputed signature*, has been used for any such purpose. While we do not question the propriety of the rule adopted in this State, we are not disposed to extend it so as to embrace *false or disputed* signatures."

Jones v. State, 60 Ind., 141, says "the prosecution desired to prove that a certain paper had been written by the prisoner. To do this they produced two papers which a witness testified the prisoner had *admitted to him* he (the prisoner) had written. It was held that the standard of comparison had not been admitted to be genuine by the prisoner, and that evidence of his admission would not take the place of this requisite" admission in court.

In Illinois (Lawson's Ex. Ev., p. 382), the certificate to the acknowledgment of a mortgage purporting to be executed by the person whose handwriting is in dispute, is not a sufficient writing proved to be genuine, although it may be read in evidence under the statute.

Bowman v. Sanborn, 25 N. H., 98: "Where papers are already in evidence *for other purposes*, and about whose genuineness *there is no dispute*, the jury may make comparison; *but if there is any controversy* as to the genuineness of the specimens, they are excluded."

Miles v. Loomis, 75 N. Y., 228: "Comparison with documents proved and *properly in evidence for another purpose*, may be made."

Hynes v. McDermott, 19 Alb., L. J., 367: "Comparison will not be allowed where the standards *are not properly* in evidence for some purpose other than being compared."

In North Carolina, Outlaw v. Hurdle, 1 Jones, L, 150, it is said, "A jury is to hear the evidence but not to see it."

Williams v. Drexel, 14 Ind., 573: "A genuine and disputed signature being upon the same page does not render a comparison of them less proper than if on separate papers."

Alport v. Meek, 4 C. & P., 267: "Where the drawer's name was admitted by the acceptance, Lendall, Chief Justice, would not allow it to be left to the jury as a standard of his signature."

2d Ph. Ev., 256: "The reasoning that because a paper is in evidence for one purpose it would be impossible to prevent the jury forming some opinion of the handwriting if not admitted to be genuine, seems not satisfactory."

Goodyear v. Vosburg, 63 Barber, 154: The signature of a witness to an assignment in evidence by the plaintiff was held not so proven as to allow the defendant to use it as a standard, to prove his signature to a bill of sale upon which the plaintiff brought suit; *and this, too, when both papers were in evidence.*

Hazleton v. Union Bank, 32 Wis., 48: "It is argued that a writing offered should have been received in evidence as tending to prove that when the same was executed, Buchanan owned the Hargrave mortgage. It is not disputed that Buchanan owned the Hargrave notes and mortgage when the same were executed; *hence the writing was irrelevant. This issue being admitted*, the writing could not be used as a standard of comparison."

Miller's Case, 37 Wis., 533: "The rule as stated by this court is explicit, that such comparison will not be allowed except with writings clearly proved and already in the case and *before the jury for some other purpose.*"

Crow v. Eastman, 1 Cush., 189: "The standard must be a genuine writing and first established by clear and undoubted proof; that is, by *direct evidence*, or its equivalent, *but not by opinion*."

Given's case, 5 Ala., 757: "In the first and second counts of the indictment, the defendant is charged with the forgery of a promissory note. The recommendation is copied into the indictment, but there is no allegation in regard to it, and it would be irrelevant to the issue on these counts it could not, upon proof that the defendant admitted its genuineness, be laid before the jury for comparison of the note upon which forgery is assigned."

Kirpsey v. Kirpsey, 41 Ala., 639: "The common law rule is that comparison is not allowed by the jury or experts with standards not in evidence for some other purpose.

2. "And this rule is not changed by the fact that the witness may be acquainted with the party's handwriting.

3. "The jury may make comparison with any paper in evidence for some other purpose if *admitted or clearly* proven to be genuine.

4. "Experts may make comparison of a genuine signature with ancient writers in dispute when living witnesses cannot be had, and such writing is not old enough to prove itself."

Williams v. Drexel, 14 Md., 513.

State v. Scott, 45 Mo., 302.

State v. Hastings, 53 N. H., 460.

Hicks v. State, 19 Ohio, 429.

Yates v. Yates, 76 N. C., 143.

Van Sickle's case, 29 Mich., 60.

McAlister v. McAlister, 703 Munroe, 270, recognizes these two exceptions *and only these*.

1 Whar. Ev., section 717: The first reason stated by Mr. Bast "for not admitting comparisons between signatures is before any comparison could be instituted a collateral issue must be tried to determine their genuineness * * to the great distraction of the attention of the jury and delay of justice."

Argument—First Assignment.

It will be remembered the first assignment points to the error of the court in admitting the pretended application of Rabago to the jury.

The *first* proposition thereunder shows its irrelevancy: the *second*, that it is admitted on the ground of its being an archive, and if so, should have been brought into court by its lawful custodian; the *third*, that the custodian holds it under a foreign law of February 16, 1870, which is not proven, as required for proof of a foreign written law, *by a copy thereof*. The *fourth* presents the error of the court in allowing it to the jury for purpose of comparison of handwriting, which error is presented under four sub-divisions.

First Sub-Division.

The law of 1828 did not require the application for land to be signed in person by the applicant, and the court erred in allowing the paper to go to the jury, and especially in not informing the jury of the law as shown in the charge asked on this question, and supported in White v. Holliday, 11 Texas, 607.

We are now considering the *second, third, and fourth sub-divisions, fourth proposition, first assignment:*

Proof by comparison of hands is not allowed at common law. Texas has changed this rule only in criminal cases. The United States Courts hold to the common law practice. Then the court has erred in allowing the jury to compare this paper with the forged power, unless permitted by one of the two exceptions to the rule. The first exception is one of necessity when an instrument is not old enough to be introduced as ancient, yet, so old that witnesses cannot be found who know the handwriting, the law relaxes the rule and allows the best evidence of which the case is susceptible. But if the paper is old enough to prove itself, the rule requires it to be proven by this means, and when so proven must stand upon its ancient character, which is better evidence than can be offered by the questionable character of other documents, themselves only proven by the lapse of the same decades upon which the principal writing has been introduced. If one witness lives, who has seen the party write, this exception cannot be invoked; so the law is written by your Honors in Strother v. Lucas (*supra*).

The second exception is distinct from the first, founded upon reasons of its own, and *so guarded as to avoid collateral issues*, which is the controlling reason for refusing to allow comparison of hands.

In this case the plaintiff asks the court to recall the rule prohibiting comparison of hands, and to keep distinct the two exceptions thereto, with the requisites of each.

If they are confused and parts of the first assigned to the second, the error of the trial court is less manifest. But apply the rule to the second and attempt to sustain the trial court under either exception clearly and distinctly stated, and it will be matter of surprise that a judge usually so accurate should have erred so gravely.

If tendered under the first exception we find each of the five requisites violated.

1. The pretended power from Rabago to Blanco, with which it is compared, is old enough to prove itself; and,

2. "A number of living witnesses" testify concerning the handwriting thereof (Trans., p. 50).

3. This application was not proven or admitted to bear the genuine handwriting of Rabago. No pretence was made to prove this, nor was it shown to have been regularly preserved and treated *by all parties* as the genuine handwriting of Rabago. On the contrary, it was found upon a $500 reward in an office where a chief clerk could not find it in 1874 (Trans., p. 27). When found it was out of its proper file among papers of another year (Trans., p, 19), where a forgery would probably be found, secreted in the office, by the hasty action of one unacquainted with the files. This paper could be forged and secreted easier, and has less to sustain its genuineness, than the paper it is used to support.

4. No expert was called to examine the paper and testify his opinion.

5. But the jury, in defiance of the well established rule against comparison, and contrary to this exception, were subjected to the confusion of making their own comparison, against which every text writer and court monotonously speak when this subject is approached.

Remembering the rule against comparison, the action of the court cannot be sustained under the second exception.

Apply the record to the exceptions as stated by the authorities quoted:

1. Under this exception there is not a shade of evidence that the application is proven or admitted genuine. Here we leave the right to insti-

tute comparison with ancient papers "preserved and treated as genuine by all parties." This license is granted to experts, and then only as to ancient documents where living witnesses cannot be had who know the handwriting. Under the second exception, now being discused, the standard must be *proven clearly beyond a reasonable doubt*, and this, too, in addition to what is necessary to admit the standard in evidence. (Bragg v. Caldwell, 19 Ohio Stat., 412.) This degree of proof is as requisite as that the proposed standard is in the evidence. Otherwise being in evidence, it is read to the jury and not shown them for comparison. "A jury is to hear the evidence, not see it. (Outlaw v. Hurdle, 1 Jones L., 150.)

Greenleaf intimates, *but does not so state*, that a standard may be established by estoppel. His authorities cited do not bear out the intimation, which is made by way of instancing examples. On the other hand, laborious research has not discovered the slightest ground for the suggestion, but the cases (Bragg v. Colwell and Martin v. Maguire, and others) already cited are to the contrary. The standard must be *clearly proven* or admitted genuine is the authoritative doctrine of text writers and decisions, qualified only by many saying the rule of exception prevails except where the standard is *admitted* genuine.

2. This application is in evidence, it is true, but over the earnest protest and denial of the plaintiff in error, who says it is irrelevant and not genuine.

3. The third requisite is wholly lacking as to this paper. The court submits it to the jury for no other purpose than comparison affords (Trans., p. 51), and candor should compel the defendants to this acknowlegement, notwithstanding it is offered as a part of their title.

But however this may be in Hazleton v. Union Bank, 32 Mo., 48, it was "argued that a writing offered should have been received in evidence as tending to prove that when the same was executed Buchanan owned the Hargrove mortgage. *It is not disputed that Buchanan* owned the Hargrove notes and mortgage when the same were executed, hence the writing was irrelevant, *this issue being admitted.*"

So here, that Rabago owned the land was *the fact* each party pressed upon the attention of the other, none denied it, but each proved it in part by a copy of the title, introducing the copies containing the contents of this very paper. Contrasting the two exceptions under which comparison is allowed, we find that the record affirmatively shows that the pretended power with which it was compared is old enough to prove itself, and the rule excluding comparison is relaxed only as to instruments of such antiquity as that no living witness can be had who can testify to the writing, but not old enough to prove itself; living witnesses testify to the handwriting, and it is old enough to prove itself. Experts are not called but the jury are allowed to compare the two papers. Then the action of the court cannot be sustained under this exception. Disabusing the mind of the ancient character of the paper, since this exception does not apply, we find this application raises the collateral issue of its genuineness of which the general rule excluding comparison is intended to be the guardian. The reason of the exclusion is the fear of a collateral issue. Yet, it is raised here with a fair preponderance of evidence against the standard, and is no direct, or even opinion evidence in its favor. The fact that the court admitted it in evidence is no reason it should be used as a standard any more than if not in evidence its genuieness would entitle it to this dignity.

First. It must be admitted genuine, or proven clearly to be so; *second*, and in evidence (not irrelevant) but, *third*, for some other purpose.

In Martin v. Maguire the mortgage was in evidence, proven so as to admit its contents, but could not be allowed for comparison; "a jury is to hear the evidence not to see it," is the opinion of the North Carolina court.

In Bragg v. Colwell, 19 Ohio Stat., the Avery note was admitted as to its contents, but was not allowed to be used as a standard of comparison.

The authorities heretofore cited bear out fully the doctrine that the standard is not estabished merely by being in evidence, but it must not be disputed—if so, and a collateral issue is threatened it is discarded for that purpose.

Comparison at best being uncertain, it is allowed by the jury, but only when there can arise no collateral question. The standard if not admitted must be practically so proven as to be admitted genuine. "But if there is any controversy as to the genuineness of the ~~opinions~~ standards they are to be excluded." (Scott's case, *supra*).

Can there be any doubt of the court's error?

Third Assignment. 32

The court erred in charging the jury as follows (Trans. p. 76):

"The defendants have also offered a paper which purports to be the original application of Miguel Rabago for this concession, which purports to be signed by Rabago in person, that is, by himself, and have offered proof to the effect that this paper came from the office of the archives at Saltillo, which is the proper custody for said application and decree, and to the effect that the signature of Governor Viesca and the secretary are genuine, with proof as to the manner of finding said paper and manner of keeping said archives; and if you believe from the proof that said paper so offered by the defendants is as old as its date imports, that it has been preserved in the archives as the initial paper connected with this grant, you may give these circumstances the weight of direct testimony to the genuineness of said signature; and if the other proof in the case does not, in your judgment, overbear this weight, you may find the signature to this original application to be the proved signature of Miguel Rabago, and use it as a standard of comparison to aid you in determining the genuineness of the signature to the writing purporting to be a letter power from said Rabago to Victor Blanco." (Trans. p. 3[illegible])-87

First Proposition, Third Assignment.

The charge is upon the weight of the evidence, being incorrect as a proposition of law. Or. p. 32

Statement.

The judge charges, "If you believe from the proof that said paper * * * is as old as its date imports, that it has been preserved in the archives as the initial paper connected with this grant, you may give these circumstances the weight of direct testimony to the genuineness of said signature." Two findings are submitted, its age and preservation in the archives as the initial

paper connected with this grant. These, the judge says, are sufficient to find the signature genuine.

Second Proposition, Third Assignment.

The court submits to the jury a question which should be decided by the court. 2 p 32.

Statement.

"If the other proof in the case does not in your judgment overbear this weight, you may find the signature to this original application to be the proved signature of Miguel Rabago, and use it as a standard of comparison." (*Ante.*)

Third Proposition, Third Assignment.

It submits to the jury a paper for the comparison of handwriting, neither proven nor admitted to be genuine, nor to be signed by the genuine signature of Miguel Rabago, nor respected as genuine by all parties. 2 p. 32.

Authorities.

The general rule is that comparison is not allowed. (Jumpertz v. People, 21 Ill., 414.)

The first exception requires a standard *admitted genuine or proved to have been respected and treated and acted on such* BY ALL PARTIES. 2 Ph. Ev., 257.

The second exception requires a standard *admitted or clearly proven to be* genuine. Gr. Ev., sec. 578 (1-2.)

The sufficiency of the facts, as well as the existence of such facts, is a question for the jury, and not the court, in determining the genuineness of an ancient instrument when left to the jury in a proper case. B. P. Co. v. Preston, 65 Texas, 452.

But the question of genuineness of a standard of handwriting is one for the court and not the jury; and if disputed should be discarded by the court and no collateral issue raised. "It was the *province of the court* to determine whether the proposed standard of comparison had been fully shown *beyond a reasonable doubt* to be the handwriting of the defendant. *So long as this fact remained in doubt* it was the duty of the court not to allow the paper to go to the jury * * * *as a standard of comparison.*" Bragg v. Colwell, 19 Ohio Stat., 412.

"If there is any controversy as to the genuineness of the specimens they are excluded." Brannon v. Sanburn. 25 N. H., 98.

The reasoning that because a paper is in evidence for one purpose it would be impossible to prevent the jury forming some opinion of the handwriting, if not admitted genuine, seems not satisfactory. 2 Ph. Ev., 256.

"A jury is to hear the evidence but not to see it." Outlaw v. Hurdle, 1 Jones L., 150.

"When both are doubtful and uncertain, comparison is not only useless as to any certain results, but clearly dangerous, and more likely to bewilder than to instruct a jury." Depue v. Place, 7 P. Stat., 428.

"It is only between signatures *in effect admitted* to be genuine that comparison is allowed." Reed v. Spold, 42 N. H., 122.

The question of genuineness (of the standard) is one *for the judge, and not the jury.* Com. v. Doe, 15 Mass, 481.

No case has come to our knowledge in which a *disputed* signature has

been used. Com. v. Todd, 36 Conn., 225; State v. Wood, 39 Ver'nt 428.

Argument.

If the proposed standard is disputed by evidence, it is a question for the court to determine whether it is clearly proven beyond a reasonable doubt.

The jury should not see the paper nor should experts be heard until this preliminary question has been settled by the court. The authorities are overwhelming. In this case experts alone should have been introduced if the court believed the paper genuine; and the jury should not have been confused by this issue, which, in its importance, forced the real issues into positions of secondary consideration. The matter ran thus: "If the power of Blanco is genuine, the defendants have the title, but to determine this it is necessary to find whether or not the application is the genuine original, and if so, did Rabago sign it with his own hand, or was it the work of an agent?" If this last issue be decided in accord with the defendant's theory, then the intricate matter of comparison will begin.

If the paper is as old as its date imports, and has been preserved in the archives as the initial paper connected with this grant, the jury are told to find it genuine. The charge does not require the jury to find the signature to have been written by Rabago, but instructs them that those two facts would be equal to direct testimony of its genuineness, and if so, then in effect that the law would presume Rabago signed it. He does not require them to find it has been respected as genuine by all parties, nor does he so conclude from the evidence. If it has been preserved as the initial paper they may use it as a standard whether it is the original paper or a copy. This question should have been decided by the court, but instead the jury has been misled by an erroneous instruction, unsupported by authority, raising an important collateral issue condemned by every court, and as a matter of evidence, without a syllable of testimony to show that Rabago signed the paper in question.

The evidence in support of the power of attorney is more certain as to its age and custody, and the paper has less suspicion attaching to its introduction into this case than the application, whose pretended signature is brought to support it. Will a jury be allowed to find one signature genuine by comparison with another more questionable than the one at issue?

Fourth Assignment.

The court erred in submitting to the jury the pretended power of attorney from Rabago to Blanco (Trans., p. 50), as follows: (Trans., p. 45.)

Translation.

5th of June 832.

"MONCLOVA, [illegible]

"SENOR DON VICTOR BLANCO.

"MY ESTEEMED UNCLE AND SIR: With this I hand you (literally 'I accompany to you') the testimonio of eleven leagues of land, which his Excellency the Governor of the State granted to me a sale of, in the department of Texas, in order that you may have the goodness to do whatever should be in your power, so that possession may be taken of them by yourself or by a person of your confidence, giving to you the most ample power so that you may cultivate them, may exchange or alienate to your entire satisfaction, because for everything I authorize you, and I stand and I will pass in all time for that which you should do; and should this my letter power not be sufficient, I will grant judicially as soon as you please, and

notify me that you require it and you excusing this trouble. I place myself at your disposal as your most affectionate nephew and servant, who attentively kisses your hands.

(Signed) "MIGUEL RABAGO (Rubric.)"

Endorsement.

"I transfer all my powers in favor of Senor Don Samuel Williams, postmaster of the town of San Filipe de Austin, in order that in my name and as my attorney he may take possession of the eleven leagues expressed in this.

(Signed) "VICTOR BLANCO (Rubric.)

"Monclova, 3d April, 1833."

Statement.

This paper was found long after this action was brought, and it had been once tried. (Trans., p. 42.) The paper has never been on record and was introduced as an ancient instrument (Trans., p. 43), found in an old trunk in Galveston in 1876 "among old miscellaneous papers" where it had been since *March, 1836*, when Samuel May Williams and other settlers "ran away" on the approach of the Mexicans; this occasion is historically called the time of the "Runaway Scrape," March, 1836.

The deed made by Blanco was *executed May 25, 1836*, in the City of Mexico, and recites that the notary *saw the power under which Blanco acted, read and returned it to Blanco.* (Trans., p. 58.) On this day the defendant's witness, William H. Williams, son of S. M. Williams, places *the paper in evidence at the mouth of the Brazos river, in Texas, in his father's old trunk.* (Trans., p. 32.) Two papers are described; one in Mexico, May 25, 1836, the other *continuously in Texas* from March, 1836.

Of the paper found in the trunk, which was in Texas on May 25, 1836, only these facts are proven:

1. In 1876, three years after this action was brought by the plaintiff, the defendant's witnesses found this paper in Galveston in an old trunk (Trans., p. 32), where it had been since March, 1836.

2. Geo. Hammekin testified he recognized the handwriting of Blanco thereon, purporting to have made on April 3, 1833 (Trans., p. 40), and an endorsement in the hand of S. M. Williams (Trans., p. 32). was recognized by A. M. Williams

3. Its similarity to the copy in Hammekin's possession. R. p. 37

Many other circumstances are attributed to this paper, but an investigation of the record will disclose that these three facts are all which relate to it *by evidence.* Many suppositions will be indulged concerning it.

To the paper under which Blanco really acted in Mexico on May 25, 1836, all the evidence introduced by the defendants is to be ascribed. It was this paper under which:

1. Blanco sold to Laguerenne.
2. Laguerenne held when he sold, by Prioland, his attorney, to Hammekin.
3. Prioland held when he so sold and of which he told Hammekin. (Trans., p. 38.)
4. Hammekin demanded a copy of this paper.
5. Prioland promised him a copy and afterwards sent it. (Trans., p. 38.)
6. This copy Hammekin gave to Rose, his attorney, keeping *a copy of the copy*.
7. Rose lost the copy sent by Prioland.
8. Hammekin introduced his copy of this copy in evidence. (Trans., p. 35.)
9. Under these copies the defendants have claimed the land since their purchase and Hammekin before them.

During all this time the paper under which the defendants now seek to claim as an ancient instrument, was unknown to any claimant, and for two months prior to May 25, 1836, remained in the old trunk in Texas, and the acts now sought to be credited to this paper were done under Hammekin's copy. (Trans., p. 29)

These acts could not have been done under the paper in evidence; it was in the old trunk from March, 1836, until 1876, and unknown to any person living. (Trans., p. 32.)

The Hammekin copy of the City of Mexico paper is in nearly identical words with the old trunk paper. Both of these are claimed in the evidence to be the original documents. (Trans., pp. 37 and 45.)

First, Second and Third Propositions.

First Sub-Division.

No possession or claim ~~under~~ was held, made or done under it by any one claiming defendant's title and the proof does not show it was acted on by any one

Statement.

This action was begun Sept. 11, 1873. This paper was first known to the defendants when found three years after in Galveston (Trans., p. 32) in the old trunk where it had been since March, 1836, the date of the historic "runaway scrape" in Texas, when through fear of the Mexicans the settlers "ran away" to the east of the Brazos river, carrying their papers, effects and valuables. The date is well known in Texas history. (Trans., p. 51.)

(From this time the paper in evidence was in the old trunk, and no act was done and no claim made under it. The day Blanco made his deed to Laguerenne May, 25, 1836, and exhibited a power of attorney to the notary in the City of Mexico (Trans., p. 58), this paper was in Texas (Trans., p. 32). Blanco did not pretended to act under it (Trans., pp. 46 and 58). Laguerenne never knew of it: Hammekin, his vendee, says he held by the

1st. Second and Third Propositions, Fourth Assignment—Third Sub-Division.

It does not come from proper or reasonable custody. 7 p 47.

Statement.

Ii is dated Monclava, 8th June, 1832,, and is endorsed by Blanco: "I transfer all my powers" to W. M. Williams. A lapse of forty-three years discovers it in the latter's trunk in possession of his son who says it had been there since March, 1836, (Trans., p. 32), unknown, even to its keeper. No act is shown *by the record* to have been done by S. W. Williams under this paper. It is not proven to have been in existence prior to March, 1836. Hammekin says the transfer is in Blanco's handwriting. He does not say when it was made, or whether its purported date is true. No evidence as to time reaches back of March, 1836.

The custody of this paper is inferred from W. H. Williams' testimony to have been wit hSamuel May Williams, March, 1836. (Trans., p. 32.) No *evidence* goes back of that date as to this paper. (See all the record.)

Authorities.

Hanrick v. Barton, 16 Wallace, p. 166: "The power of attorney in the present case was specially referred to and acted on in the final grant of title, as appears by its recitals and became a paper necessary for the land office to have in its possession in order to see the grounds for extending title to Williams as the attorney in fact of La Serda."

Lemington v. Marquis of Stafford, 3 Tantoa: "An ancient document preserved in the British museum is not admissible—the custody not being proper."

1 Gr. Ev., p. 713: "Whether a document comes from the proper custody is a question for the judge and not for the jury."

2 Ph. Ev., p. 369: "We expect to find them, if genuine, in the possession of some one claiming under the grantee, and preserved among muniments of title. When so found the fact is favorable to their authenticity and reality as deeds. But on the other hand, if found in the custody of strangers entirely unconnected with the estate, *or even if found in the proper custody*, if they appear to have been thrown aside among papers of little or no value, this raises presumption against them *which must be overcome* before the mind can assent to their genuineness."

Argument.

First. No act was done under it.

If only age is necessary to be proven "a knave would have nothing to do but forge an instrument with an ancient date." Proper custody and age "are as consistent with forgery as with genuineness." The forgery is always in proper custody; the forger has possession of and claims under the forgery.

To admit an instrument as ancient, "possession must be shown under it, or some other ACT freeing it from all just grounds of suspicion."

Apply the record Three facts are proven, and only three.

First. It was found in Galveston in 1876 among "old miscellaneous pa-

pers." Hammekin says: *second*, "the transfer endorsed on it is in the handwriting of Blanco, and another witness that S. W. Williams' appears on it; *third*, the copy of the copy in Hammekin's possession is of like tenor and effect. It will be claimed that Samuel May Williams acted under it in locating and patenting the land in December, 1833, and January, 13, 1834. There is no proof of this. It may be violently presumed, but search for facts upon which to base presumption, and not presumption upon which to invent facts.

So far from its being the power under which this land was located, the record proves the contrary. A transfer on the paper by Blanco authorizes Samuel May Williams "in my name" (Blanco) to take possession, etc. (Trans., p. 46), whereas (Trans., p. 11), when Samuel May Williams acts in the premises he says nothing of Blanco, but acts as "attorney for citizen Miguel Rabago," as if he had a direct power, and does not act in Blanco's name.

Again, this paper is traced no further back than March, 1836. Will it be presumed Williams had had it more than two years before that date, and if so, does this possession show it was acted on by him contrary to the instruction contained in the transfer to him, or will this also be presumed?

From the date of the grant, January 13, 1834, until 1876, the defendant's theory is that this paper was in Samuel May Williams' possession, and if so, the plaintiff says no act could have been done under it by Blanco or his vendee. If Blanco ever had this paper and transferred his powers to Williams, it is not shown except by the recital, in the paper itself, which cannot be evidence of its contents until in evidence; and until proven, why not presume that Williams received it just before the time he sent the old trunk off in the "runaway scrapes." Beyond this evidence it is silent, and beyond the evidence this court should not go in supporting a title-bond itself, not upon proof, but upon a rule of evidence, which says that acts must be shown—*not presumed*—freeing the paper from suspicions. As to its age, W. H. Williams, son of Samuel May Williams, says (Trans., p. 32), it was in Texas March, 1836. The witness was then three years old; but let his incompetency pass.

March, 1836, is the period beyond which the record is silent. Absolutely no fact is pretended to be proven beyond this date, referable to this paper; yet, with a reckless disregard of the rights, which are placed in the absolute control of a Supreme Court, the court of Texas in 49 Texas, p. 697, enumerated a number of acts, credited to this paper, which are not proven to have been done under it, and which could as well have been done without a written power (White v. Holliday, 11 Texas) as with one:

That court presumes that acts proven to have been done were done under this paper, when the rule requires that the acts be proven, and be proven to have been done "*in accordance with*," and "*under*" this paper, *from which* we may presume its genuineness. First prove a paper existed in 1876, then prove acts, then presume genuineness. But do not prove a paper existed in 1876, prove acts in 1833, and presume the paper existed in 1832, and that it was genuine.

We find a grant to Rabago of eleven leagues of land, and the Supreme Court of Texas says it "*must have* been obtained under this power." Why must it have been so obtained? Just here a few extracts, upon which its opinion is based, will be quoted to illustrate the inaccuracy of its conclusions:

That court says: "But as the latter (Blanco) appears to have taken the precaution to have another power of like effect from Rabago, *or to have*

secured an official copy of this one before remitting it to Williams, there was no necessity of its being returned to him." 49 Tex. Supl p. 690.

There is positively no intimation that Blanco secured such a copy. (See all the record.)

Appellant insists "that it was shown by appellees themselves that Blanco must have had *this same power* or *copy of it* in the city of Mexico in 1836, when he conveyed the land to Laguerenne" Trial 1st par. p. 690

Plaintiff did not and could not have so claimed. The defendants show that the paper before this court was in Texas, and that another paper (original and not a copy) was in the city of Mexico on May 25, 1836—two separate and distinct paper originals—the Texas paper in an old trunk with "miscellaneous papers"—the Mexico paper claimed and acted under for years by these defendants.

"But," says that court, "the ground of suspicion from which such instruments are to be freed * * refers to something apparent upon their face or shown by some fact or circumstance directly connected with them, and not to extraneous testimony, which is for the jury in passing upon their genuineness after they are admitted;" citing 1 Gr., Ev., sec. 21, which not only does not support the doctrine but state the rule "that it must be otherwise free from just grounds of suspicion." p. 696.

But receiving the rule as stated by that court, the record shows that the deed made to Laguerenne recites a power in the City of Mexico, May 25, 1836. (Trans., p. 58). Whilst the defendant's witness Williams, who lays the predicate for its introduction, says this paper was in Texas "among old miscellaneous papers." These wholly inconsistent facts appear by the defendant's ~~evidence~~. That court says: "It was * * acted on by Williams when he presented it to the commissioner, and again by the commissioner when he issued the title." The record does not so state. If the papers were in evidence properly proven, this might show authority for these acts; but these acts do not prove the paper existed at the time. Yet they are so applied.

"But it is said Williams may have acted under some other power," says that court. The plaintiff is not required to say this. He shows a valid legal title in himself, and is not called upon to show how Rabago obtained the grant. Rabago obtained it and the plaintiff has his title. If the defendants say Samuel May Williams acted under this paper in extending title, the plaintiff asks for proof of the fact. He is not shown to have been in possession of the paper for two years thereafter. The defendant must first prove the existence of the paper and then an act under it, not prove that the paper existed by the fact that an act was done which may be independent of this paper. The fact that a grant was made to Rabago on January 13, 1834, proves nothing as to this paper's then existence.

"Blanco must have had possession of and have transmitted the concession to Williams, for he certainly knew that Williams could not get the title without it." (49 Texas, 57.) Of this there is no evidence. This paper and this paper alone says Blanco once had a concession; it does not identify this concession, yet in trying to prove the paper, *its contents are quoted* as evidence, and enlarged upon with argumentative force. By such reasoning titles may be argued away by quoting supposed evidence, which is alone found in the paper which is quoted to prove itself for admission to the jury.

"The land has been claimed and held under and by virtue of this power from Rabago, *or copy of it*, which Blanco could have procured if he desired, even without the concurrence of Rabago (Eschriche, 686-688), from its sale,

without question or adverse claim from any one for nearly forty years." (49 Texas, 582.) It would be difficult to find a grosser misrepresentation of fact or more absurd statement of the law as found in Eschriche, the citation to which work refers to powers in instruments of security. The land had never been claimed under this paper by any one until after this suit began—Rabago, Blanco, S. M. Williams, Laguerenne, or any one else. Hammekin swears that he claimed it under the copy of the paper exhibited in Mexico, May 25, 1836. (Trans., bot. p. 18.) He could not have sworn the truth otherwise. This paper in question had not been heard of until 1876, and they could not have claimed under it. Shall we presume these defendants took possession and claimed under this paper of which they never imagined until 1876, three years after this action was brought? Base the title upon evidence showing facts, from which presumptions may follow, but not upon presumptions creating pretended facts. The only issue presented to the Supreme Court of Texas as to this paper was upon plaintiff's objection that it did not come from proper custody. (See 49 Texas, 595.) This was all the court was asked to decide, and in going further the opinion is but a *dictum*, not binding upon any subsequent trial as the law of the case nor binding upon any court as stating the semblance of what the law should be upon *the facts proven by the record*.

The facts referred to, so far as found in the record and not idle speculation, are referrable to the paper shown the notary in the City of Mexico—not to this paper—and if these were sufficient to prove the execution of a power, the defendants prove by the very witness who is introdnced to lay the predicate for its introduction, that the paper in question could not have been that paper.

The defendants do not claim that they introduce evidence to show the execution of the power this was left for the speculation of the court to invent.

"Even if the power had not been produced, the facts disclosed in the record were certainly more than sufficient * * * to have justified the presumption of its existence and *due execution*." (49 Texas, 590.)

This may be true; but will any court go so far as to state that a presumption of a power will be indulged when the pretense is that the power itself is produced?

The plaintiff confesses freely that the presumption of the due execution and genuineness of the paper shown in the City of Mexico under the laws and decisions of Texas presents a more consistent title in defendants than the disjointed link attempted to be introduced as an ancient instrument. But the defendants do not ask the court to presume the existence of a power. They forego this by producing the pretended paper itself.

The question now is, have these defendants shown by proof such acts under and by virtue of *this paper* (not the City of Mexico power) as will raise the presumption of the defendant's title by virtue of it and no other? The questions are not—Shall we presume that this paper was in Williams' possession on December 3, 1833? against his own statement that he acted as attorney of Rabago, whereas this paper would have authorized him to act only in the name of Blanco. Shall we presume that Blanco acted under this paper on May 25, 1836, in the City of Mexico, when it was in Texas, and he says the authority under which he acted was then in his possession in that city? Shall we presume Hammekin swore falsely when he testified he claimed under a copy of the paper in Blanco's possession May 25, 1836?

Such is a brief review of this case as reported in 49 Texas, and if your Honors are inclined to respect the opinions therein rendered, it is hoped a

comparison of the pretended facts quoted will be made with the present record.

This paper, then, is without a single act *under* it to support it as an ancient instrument, and, if proven, the recitation in the Laguerenne deed that this deed was made by virtue of another power of attorney, according to 2 Perry on Trust, would exclude the defendants from claiming under the power in evidence.

2. It is not free of suspicion.

A paper can be shown so suspicious as to render it inadmissible. What will constitute such suspicious fact? Are erasures and interlineations the only circumstances? If so, the skilled emanuensis cannot be prevented from outright forgery of such documents. The *res gestæ* must be of equal value with the thing itself It is found in the hands of a stranger, among "old miscellaneous papers," (testimony of W. H. W., Trans., p, 32, the words of defendant's witness). Phillips on Evidence says this is a fact which "raises a presumption" against it. When on May 25, 1836, it should have been in Mexico in use, it was in Texas among papers of such little value that they were unknown to their owners when found, whilst another paper is recited (in the deed to be supported by it) as the power "by virtue" of which it is made. For at least forty years it was in strange hands, in so far as any claim under it is pretended to be shown, whilst another paper performed its functions. It is not acknowledged or otherwise authenticated. No parallel to this paper is found among the reports of acts done during the years in which this paper is said to have been used. The Mexican law was careful of such powers, and no like power has been found in the reports of Texas, California or Louisiana. It is remarkable if this paper was signed by Rabago in Monclova, where it bears date, and delivered to Blanco, that it did not suggest or require an authentic act executed before a notary, which would have set this matter at rest. It was sufficient to authorize Blanco to locate the land and extend title, but as a power to sell it was wanting in every usual requirement. This lack of formality, witnesses and other evidence of genuineness is consistent with the theory of forgery; but, if not inconsistent with genuineness, it is strongly suspicious that Rabago did not execute the paper.

3. It was found in unreasonable custody among papers of no value.

It was Commissioner Alderitz's duty to attach Williams' power from Rabago to the original title, if the power was a written one. Hanrick v. Barton, 16 Wall. 166. It is presumed Alderite would have done so. The conclusion is drawn that Williams' possession of the paper in evidence began after this title was extended, or else it would have been attached to it, and that he never had occasion to use this power and filed it among his "miscellaneous papers." This is consistent with the custom and law of the times and with the evidence. (Hanrick v. Barton). It should have been found by the plaintiff's witness Flores (Trans., p. 29), when the title was found in Saltillo, if it related to this title; but if S. Williams received it in March, 1836, too late for this title, his possession cannot aid it. If his is proper custody, yet, if the paper be found *among others of little or no value*, a presumption is raised against the instrument "which must be overcome." 2. Ph. Ev., p. 369. This paper was among "old miscellaneous papers" of so little value that their owner says "I paid no particular attention to them." (Trans., p. 32 and 33.)

If forty years spent in an old trunk among "miscellaneous papers" in the hands of one ignorant of its existence, and not proven to have been acted

upon by any one during that time or previously, fail to show affirmatively an improper custody, the task is indeed difficult.

The court below instructed the jury (Trans., p. 52), "although the original might at the time be in Samuel May Williams' trunk in Texas, Blanco's conveyance to Laguerenne would not on that account be without authority *if the said paper* in Williams' trunk was a genuine paper giving him such power. Such power, if conferred, was conferred on the one named and remained with him whether evidenced by the original writing or such copy." This may be true when a paper is to be proven by witnesses. But here the paper is called on to prove itself. In the first instance, the witness swears to its genuineness, and it matters not where the paper is, the witness is its voucher; in the second the paper itself is allowed by law to evidence its own genuineness; present in court it speaks for itself through its own age, custody and usefulness. It is a thing vouching for its own integrity—the very parchment and ink are the witnesses, testifying of themselves.

The Blanco power in evidence cannot be found genuine except by its proving itself so. To say that if genuine, a copy could have been acted under, and it mattered not that the orginal had been in the old trunk, states a proposition correct when the original is proven by a witness, but wholly contrary to the law of ancient instruments and incorrect when the paper must prove itself by *proper custody*. Take two papers—one is proven thirty years old, and possession of the land is held under it, but it is found in improper custody. The other is proven thirty years old and found in proper custody, but no act is done referable to it. Can either prove itself as an ancient instrument?

If not, then can the two be introduced together, each supplying the defects of the other? In the case at bar, one paper is acted on in the City of Mexico May 25, 1836, and is continuously acted under by holding possession and paying taxes for more than thirty years, but it is not produced. Another is produced having been in a foreign jurisdiction on May 25, 1836, unknown to the grantee in the deed to be supported by it, and not acted on during forty years, found in the custody of a stranger to defendant's title, unknown to the defendants. Is either paper proven? If either, why not the first? The first is proven to be over thirty years of age, to have been acted on continuously and was in proper custody when last heard of. Yet no one will contend that it is proven as an ancient instrument; the paper is not itself here or accounted for; it does not testify for itself through its age, custody and use, in its own person.

The second paper is here, but it fails to testify for itself through its custody and use. Each paper must come in its own proper person, and *its age, its custody and its use* must declare its genuineness as being what it purports to be. But its genuineness cannot be established by the use of a copy, nor can the copy be authority for an act until the original is proven genuine by a witness, or the original be proven by its own age, its own use, acts under it, and its own custody. After such proof the copy for the first time may be authority. The court confused the jury in saying, if genuine a copy of the power could be used, "although the original might at the time have been in the old trunk," because it could not be known to be "an original" until proven genuine by proper custody and by the acts done under it which the evidence shows were done under the other paper.

If two instruments may be united and from them both sufficient evidence be found to support a link in a chain of evidence, then the defendants can be heard on this record; but if an ancient instrument is said "to prove itself" and not to be proven by another, the defendants wholly fail.

The only evidence upon which the defendants rely to introduce the paper shows that it could not have been either acted upon or have been in reasonable custody. It is not a conflict of evidence, but the defendants admit and prove the facts and rely upon them. Recognizing this, the trial court, referring to the unreasonable custody in which the paper is found, erroneously says although so found, this would not affect acts done under a copy. No copy in fact has been relied upon by the defendants (Trans., p. 52.), who claim that the power "found in Williams' old trunk is an ancient instrument and was the *identical* power under which Blanco acted in making the sale to Laguerenne." (Trans., top p. 54.)

The court admitted the paper and told the jury if genuine they may so find, although the acts were done under a copy. But how is the original to be proven genuine? By acts done under it. Then, if the acts are done under another paper, is this proven genuine?

Yet here the acts were done under a paper which the notary refers to as an original and not a copy, shown to him as an original in Mexico May 25, 1836, and returned to Blanco. This is the last known of the paper itself under which the defendants have always claimed, whilst they attempt to introduce a paper found in the hands of a stranger, amongst old, valueless waste documents, as the living, active muniment of their title.

Fourth Proposition, Fourth Assignment

It is not such an instrument as would have granted power to convey the title to Laguerenne by an authentic act in 1832 or 1836 in Mexico. (Trans., p. 36.) 47.

Statement.

This objection was not made on the appeal to the Supreme Court of Texas. (49 Texas, 582.) By reason of no such power of attorney having been used in Texan or Mexican conveyancing, the question will be here decided for the first time as to powers of attorney. The deed made under it is an authentic act (Trans., p. 58), whilst the power itself is not witnessed nor executed before a notary, nor with any formality, being a simple private letter. Nor can it be admitted as an ancient instrument unless it complies with the formalities required by law at the time; so that if the court holds it otherwise good as an ancient instrument, it is further objectionable for the reason stated in this assignment.

Argument.

This court must hold this instrument inadmissible as ancient merely, but should the conclusion be reached that it comes from proper custody and has been acted under and freed from suspicion, then the objection now raised is insurmountable and must be held as conclusive against its validity, both as an ancient instrument and as incapable of supporting the Laguerenne deed.

First and Second Sub-Divisions, Fourth Proposition, Fourth Assignment.

1. It is not acknowledged, witnessed, certified to nor written on sealed paper, nor proved before a notary. R. 40. 47

2. No summons was ever served on Rabago to appear before

an official for the purpose of rendering it an authentic or judicial act. 2 p. 47.

Statement—First, Second ~~and Third~~ Sub-Divisions, Fourth Proposition, Fourth Assignment.

The deed to Laguerenne, claimed to be made under it, is an authentic act, executed with great formality. (Trans., p. 46.) There is no formality in this (Trans., p. 46); a mere private letter.

Authorities.

As late as Cowan v. Williams, 49 Texas, 566, it is held questionable whether a paper executed before a notary without instrumental witnesses can be offered in evidence. "But," says the court, "as the question may be more thoroughly and satisfactorily discussed on another trial, we need now make no definite ruling regarding it."

Hall's Mexican Law, p. 565, § 2038: "A power must be made by a public writing, when in virtue of it the attorney has to execute in the name of the principal any act which in conformity with the law must appear in a public instrument."

Hamilton's Mexican Law, p. 76, Art. 303, is to the same effect.

Hamilton's Mexican Law, p. 76, Art. 305: "The omission of the requisites annuls the power of attorney as between the principal and third parties, and only the agent is bound."

Hall's Mexican Law, p. 580, §2147: "A contract of purchase and sale does not require for its validity any special formality except when it pertains to immovable property."

Hall's Mexican Law, p. 580, §2151: "If the value of the immovable property exceeds $500, the sale shall be reduced to a title made before a notary (*escritera publica*).

Hamilton's Mexican Law, p. 43, Art. 29, is to the same effect.

Escriche word "Podee," p. 1353. "El poder ha de hacer se ante escribeno publico; y ha de contener los nombres del ponderdante y del a poderado, los de los testigos," etc. "A power of attorney must be made before a notary public, and contain the names of the principal and agent, those of the witnesses," etc,

Escriche (Instr. Pubco.), bot. p. 887, in defining a public instrument, says; "Que el escribano conozco personalmente a los otorgantes y de fe de ello al fin de la escritura," etc. "That the notary shall personally know the parties and certify thereto at the end of the writing;" and if not known, they shall be introduced on the oath of two witnesses and if this cannot be done "que no la haga ni resciba,"—that the instrument shall not be made nor accepted.

A power not under seal will not authorize a deed under seal.

Watson v. Sherman, 84 Ill., 263.

Peabody v. Hoard, 46 Ill., 24.

Clark v. Graham, 6 We., 577.

Argument.

The power is a private paper. The deed offered under it is a most formal instrument, and the parties to it—Rabago and Laguerenne—should be known to the notary. (Escriche Ins. Pub., 887.) To make a sale of real estate of value over $500, the deed must be a public instrument. A power of attorney must be as formal as the deed.

In California and Texas it has been held that a verbal sale of lands may

be made under the Mexican law. This is not the question here. The sale is made by a public instrument. Can the power be given in a private paper to make a sale by a public instrument? The analogy of the common law is against such powers. An instrument not under seal will be no autnority for a sealed instrument, and a private power cannot be held to support a public instrument. (H. Mex. Laws, §2038.)

Fifth and Sixth Propositions, Fourth Assignment.

These exceptions will not be presented. Tr. p. 47

Seventh Proposition, Fourth Assignment.

If it empowered Blanco to sell, he transferred all his powers to S. M. Williams contained in this (Trans., p. 45), and acted under another paper. (Trans., p. 58.) Tr. p. 47

Eighth Proposition, Fourth Assignment.

If genuine, it was executed five years before the deed to Laguerenne, and was abandoned. Tr. p. 47

Ninth Propositions, Fourth Assignment.

If genuine, it was revoked by the war between Texas and Mexico and no title passed by deed under it. Tr. p. 47

Statement.

These three propositions will be considered together as inconsistent with the present claim under the paper in evidence.

The deed to Blanco was made in "virtue of a letter power which * * * I have seen, read and returned to the party, and to it in his possession I refer." (City of Mexico, May 25, 1836. Trans., p 58.)

The old trunk paper was on that day at the mouth of the Brazos in Texas. (Trans., p. 32)

The latter bears date June 8, 1832, and "all powers" therein contained are transferred to Samuel Williams on April 3, 1833 (if it speaks truly, which is denied), and according to defendant's evidence the paper was never seen again by Blanco, but for forty-three years remained in the old trunk of Samuel Williams, and was not produced until after this case had been once tried. (Trans., p. 42.) Five years after its date, Blanco acted under this "identical power," according to defendant's theory (Trans., p. 54), but really under another (Trans , p. 58). It was found in 1876 among old papers of no value (Trans., p. 32), unheard of for forty years, in the hands of a keeper ignorant of his charge, who had received it from one to whom all its powers had been conveyed for the purpose, as it says, of taking possession and who never acted under it—so far as we are to judge and be guided by the light of the record alone, and not the false lights of presumption, unwarranted by law. (See all the record.) The deed of the defendants was the first warranty ever made under this title, all others being quit claim (Trans., p. 41). "I always made quit claim deeds until I sold to Conger." (Gen. H.'s Test., Trans., p. 41.)

Texas had declared her independence of Mexico March 2, 1836, and the battles of the revolution, including San Jacinto, had been fought. Texas was a republic, free, independent of and foreign to Mexico on the 25th of May, 1836 when the deed to Laguerenne was executed.

Authorities.

Story's Agency, §499: "If the agent, in the performance of his agency, makes a complete sale (completes his trust), the agency is *functus officio*, and therefore has its natural termination." (Blanco had transferred "all his powers" and Williams had cast the paper aside.)

Moore v. Stone, 40 Iowa, 259. Where an agent was employed to purchase land, it was held that his agency ended with the delivery of the papers and the final transfer of the money. (Blanco had delivered the paper to Williams and never saw it again, having transferred all his powers thereunder.)

Grossmayer v. U. S., 9 Wallace, 72: It has been found necessary that as soon as war is commenced, that business intercourse should cease without any express declaration of the sovereign.

2 Perry on Trusts, 3d ed., p. 46, §511 c: If a man has several powers, and refers to one and not to others, the execution will exclude those not referred to.

The ground upon which a deed is held on execution of power is merely to prevent the deed being inoperative, not beyond that. (Arg. in) Mandrell v. Mandrell, 10 Wis., 251.

Judge Story says: "The power of attorney shown does not appear to be the one under which C. L. Clark acted. * * * It is said the relinquishment purports to be made in virtue of a power of attorney, recited in the instrument itself, from James B. Clark and his wife, and John Bryant and his wife; whereas, the power produced purports to be from Clark and his wife only, and therefore the latter does not authorize the relinquishment, or, in other words, it was not that under which it was made. There is great force in this objection, but on this also we do not decide." (Reversed on other grounds.) Clark v. Courtney, 5 Pet., 347.

"But whether the will be genuine or not, it has not been treated as valid, as no claim has been set up *under it*, and all the heirs" (though claiming the land) "have acted in regard to the estate of their father as though he had died intestate." Morgan v. Boyle. 19 Howe, p. 133.

"The Ballard deed was not admissible in evidence as an ancient instrument, for it was cut off by the award in favor of Torrey," under whom claim was afterwards held. Chowder v. Hopkins, 16 Paige, 183.

Argument.

The record shows not only that this paper was not so acted on as to be introduced as an ancient instrument, but it shows an implied cancellation of the power by the manner of its use. All the attorney's powers had been transferred by him. Another paper is referred to as the authority for the deed (Trans., p, 58), which Perry on Trusts says excludes this paper; it was abandoned, never referred to or heard of by the parties to it, thrown aside among old papers of little value during a war between Texas, where the land lay, and Mexico, where the deed was executed to an alien to Texas. It was never recorded in the records of any office, always a vagrant paper, without a witness to pledge its birth or a history to give it credit earlier than 1876. If genuine, can a paper live from 1832 to 1876, and for the first time appear in the records of the country after a hotly contested trial of this case has rendered necessary some help for a cause already lost? If ever genuine, such absolute abandonment and recitation that the act to be supported by it was done under another paper, forever puts this pretense of title out of consideration.

The record shows that this paper, the deed pretended to have been made

under it, and the power from Laguerrenne to Priolland, were never of record in any office in Texas. They rest dormant for forty years. The deed executed to the defendants in 1873 was the first warranty deed made under this pretended claim. (Def't's. testimony, Trans., bot. p. 41.) It may be answered that a power survives its transfer. No authority to that effect has been found. This may be conceded if the paper is proven in court by witnesses, but when the paper is introduced on a presumption that it was the paper under which the deed was made, a transfer of "all powers" in it, coupled with a recitation in the deed that another had been the authority, rebuts this presumption without the fact that the defendant's vendors never made a warranty deed until the one made in 1873, just before this action was filed, under which the defendants claim. (Trans., p. 41.) If held that the recital of a power does not exclude other powers when proven by direct testimony, Judge Story in Clark v. Courtney, *supra*, says, "There is great force in this objection," where proof of execution is made; but when the power is introduced on presumption of genuineness as an ancient instrument by attempted proof of the claim *under it*, the objection is unanswerable.

Tenth Proposition, Fourth Assignment.

It could not act as a verbal sale, as no possession was taken of the land by Laguerenne. 2 v. p. 47.

Statement.

There is no evidence that Blanco or Laguerenne was ever on the land. No possession was taken until after 1850 under this title. (Trans., p. 40.) There is no evidence of payment by Laguerenne of the purchase money to Blanco, except the recitals of his deed, and no evidence that Rabago was ever paid for the land.

Argument.

If consent, price and possession are proven, there is no question of the validity of a sale of land by parol or private instrument under Mexican law, but to make a sale of land so as to carry full proof of these facts, irrespective of other evidence, the sale must be evidenced by an authentic or public act. If one of the contracting parties be an agent, his authority must appear by a public act, if the instrument is relied on to carry full faith. But if the sale be by parol or private paper, then full proof must be made by other evidence of the consent, price paid and that possession was taken No such proof is attempted in this case.

Fifth Assignment.

The court erred in charging the jury upon the said pretended letter power that: "By the law in force at the time this letter power of attorney purports to have been transferred to Samuel May Williams, April 3, 1833, authorizing him to solicit title and take possession of said eleven leagues, and at the time said Blanco made his deed to Laguerenne, Blanco could have procured, if he desired, and retained in his possession, a *legal* copy of the power of attorney which would have all the force and effect of the original." (Trans., p. 79.) 2 v. p. 47.

In this connection will be presented the

Second Proposition, Ninth Assignment.

The court erred in refusing to instruct the jury as requested by plaintiff: "You are further charged that in order to find for the defendant you must believe that the power of attorney under which the sale was made to Laguerenne by Blanco is the same which was presented to you in evidence as having been found in the trunk of Samuel May Williams." (Trans., p. 66.)

(This refused charge presents the issue as contrasted with the charge given and complained of in this, the fifth assignment.)

First Proposition, Fifth Assignment.

There is no evidence that Blanco attempted to or did procure a *legal* copy, but it shows he acted under an original. (Trans., pp. 37, 48 and 58.)

Second Proposition, Fifth Assignment.

The charge led the jury to consider the Mexico paper a *legal* copy instead of an original as it was. (Trans., p. 37.) 48

Third Proposition, Fifth Assignment.

The old trunk paper was never filed in any office from which a *legal* copy could have been taken. (Trans., p. 48.)

Fourth Proposition, Fifth Assignment.

A *legal copy* of a private paper could have been had only upon notice to Rabago, which is not attempted to be shown. (See all the record.) Tr. p. 48

Statement.

There was no evidence upon which to base such a charge (see all the record), and defendant's theory was to the reverse of this, "that the letter power found in Williams' trunk is an ancient instrument and was the identical power under which Blanco acted in making sale to Laguerenne." (Trans., top p. 54.) This act of sale (Trans., p. 58) does not refer to a private copy, an official copy or any other kind of a copy, but says that the power itself was in Blanco's possession. The certificate to the "Hammekin copy" of the paper in Blanco's possession recites that that paper was "the original power that Don Victor Blanco presented to me [the notary] and the same that I had before me when making out the bill of sale that, on the 25th of May, 1836, I made by virtue of it" (Trans., p. 37; notary's certificate to Hammekin's copy.) On this day the old trunk paper was at the mouth of the Brazos, in Texas (Trans., p. 32). As to it, a number of living witnesses testified that they were acquainted with the handwriting of Miguel Rabago, and that the signature to this paper is not Rabago's writing. (Trans., p. 50.)

Authorities.

Lucas v. Brooks, 18 Wallace, 454. "A judge well performs his duty when he guards the jury against having their attention diverted from the real issues."

Bump's Fed. Pro., 302: "If an instruction is given when there is no evidence to support it, then there is error, for its tendency is to mislead the jury by withdrawing their attention from the legitimate point of inquiry involved in the issue."

U. S. v. Breitling, 20 Howard, 252: "It is clearly error in the court to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered. * * It may induce them to indulge in conjecture, instead of weighing the testimony."

Argument.

The court charged the jury upon the theory that the paper in evidence is an original, and the Mexico paper a "legal copy." Here is the evident inconsistency shown by the record. One original paper was exhibited in Mexico (Trans., p. 37) on May 25, 1836, and another pretended original rested in the old trunk on the banks of the Brazos, in Texas, on the same day. (Trans., p. 33.) This evidence is offered by the defendants.

There is absolutely no evidence that any copy was made, not to say "legal copy," as charged by the court. A copy of the Mexico paper is in evidence, made for Hammekin, a subsequent vendee, but the court does not refer to this copy. Though pretending to be a certified copy, it does not pretend to relate to the old trunk paper, or a copy of it, but to the "original power" presented to the notary, May 25, 1836, in Mexico. (Trans., p. 37.)

Of the two pretended originals, if either is a copy, the one in evidence is shown to be such by a preponderance of evidence. "A number of living witnesses who are acquainted with the handwriting of Rabago," (Trans., p. 50), say the signature to *this* paper is not in Rabago's handwriting. The notary before whom the Blanco-Laguerenne deed was made, says *that* paper was an original. (Trans., p. 37.) If the paper in evidence was not signed by Rabago, and is in similar terms to the Mexico paper—an original—then this paper is the copy, and not the other—if either be a copy of the other. Yet the jury are charged upon this evidence, that Blanco could have obtained a "legal copy" of the old trunk paper. They take this view and find for the defendants. No other theory is presented by the charge of the court than that Blanco had, and acted upon, a "legal copy (Trans., p. 49) of the old trunk power when he sold to Laguerenne, in Mexico, May 25, 1836. The jury were held to this theory and found upon it; yet the record shows an absolute denial of this state of facts, and proves by the recitals in Laguerenne's deed, (Trans., p. 58), and the "Hammekin copy" (Trans., p. 37), that Blanco had no "legal copy," but an "original power" which the defendants fail to produce, and *under which on the trial* they did not pretend to claim, their theory being "that the letter found

in Williams' trunk is an ancient instrument, and was the *identical power* under which Blanco acted in making the sale to Laguerenne." (Trans. p. 44.) – 67.

In pursuance of this theory the plaintiff asked the charge presented in the assignment, stating the defendants' theory in the language used by themselves in preparing the record for this court. This the court declined to give, thereby failing to submit the most material issue in the evidence.

The charge presents an issue permitting the jury to find a "legal copy" to have been the paper acted on in Mexico, and as matter of law that such legal copy would sustain the title not only without evidence to support this theory, but directly against the defendant's theory (Trans., p. 54) and evidence (Trans., p 37). No charge is given the jury to the effect that if they find the paper acted on in Mexico to have been a genuine original, they could find for the defendants, but they are told that at that date Blanco could get a "legal copy" of the power in the old trunk, and if the latter was found genuine the "legal copy of the power of attorney (which) would have all the force and effect of the original." This is the only issue presented on this evidence. As will more fully appear in the next assignment of error, the court treats the Mexico paper as a copy of the old trunk paper, and misled the jury by drawing their attention from the fact that the defendants' evidence clearly discloses two pretended original powers. We have then two papers shown by the context not to be original duplicates, substantial copies of each other, acted under as original evidence of authority, called originals, and originals so far as the evidence of the defendants can be believed.

The court, in his charge, was confused, as he well might be, and attempting to harmonize the evidence, charges that one could have been a "legal copy" of the other. The error is manifest, and were it not that the plaintiff wishes the law of the case settled in view of the next trial, would willingly submit the record upon this assignment alone.

By their verdict, the jury found the Mexico paper a legal copy of the trunk paper—were compelled to do so by the charge; and in doing so found a verdict on an issue not raised by the evidence and wholly unsupported in law or in this record. Whereas, if the charge asked had been given, the defendants' theory would have been met, the issue joined, and the jury would have passed between the parties on the merits of the evidence.

As the case now stands, the plaintiff prepared to meet the defendants' theory and evidence, and asked a charge thereon. This was refused. The trial court shifted the issue, framing a new one not relied on by the defendants, and not presented in the evidence. Until this charge was given, not the faintest trace of a "legal copy" of the old trunk paper was to be found. The Hammekin copy was taken from a copy of the City of Mexico

paper—an original power (Trans., p. 37)—and the fact that it is in almost identical terms with the old trunk paper, gives it no verity as a copy of the latter, unless the connection be established between the two originals; and what is this connection? Are they originals—duplicates of each other—or is one a copy and the other an original; if so, which is the original, and which the copy; but if a copy, where is the evidence of the nature of the copy? Is it a "legal copy," a mere private copy, or a sample copy; a sample copy of any number of others, which may be had when the emergencies of this case demand them? The evidence says they are originals, the defendant claims Blanco acted under the old trunk paper, and the plaintiff asks the cause to be remanded that he may have this issue tried by a jury, free of a misleading instruction to find upon a "legal copy," of which no evidence exists in the record.

Sixth Assignment.

The court erred in the charge upon the evidence relating to the old trunk power. (Trans., p. 48.)

"The defendants introduced testimony tending to show that as early as 1838, Hammekin had placed in his possession the deed from Blanco to Laguerenne, refering to such a power of attorney; that he insisted on having an authenticated copy of said power furnished him; that very soon thereafter he received said copy of said power, which he placed (with other title papers) in the hands of his agent, retaining a copy made by said Hammekin, which copy has been given you, declared by the interpretor *to* be identical (with immaterial exceptions) in terms with the letter power offered by defendants that Hammekin had placed the testimonio in the land office as required by law, of persons having such evidence of title to land in Texas; that said Hammekin paid the government dues on said grant—had paid taxes, had sent agents to the land as early as the growing settlement of the territory so far freed this section of the country from hostile Indians as permitted its occupancy, and the assertion of ownership by assuming actual control of it; and that Hammekin and those to whom he conveyed, and the defendants claiming under them, had continued to assert ownership to these lands under said power of attorney; and if in your judgment said proof establishes such facts, and the proof as to the age and custody of the said letter power satifies you that said paper is as old as its date imports, and has been in the custody that said evidence indicates, you may consider this proof equal to the direct testimony of a least one witness to the signature of Miguel Rabago; and unless in your judgment the evidence of plaintiff's witness, and all the circumstances of these parties and these transactions, as shown by all the testimony, *proves* that Miguel Rabago did not sign said letter power, you will find said letter power to be genuine and return your verdict for the defendant." (Trans., p. 47)

First and Second Propositions, Sixth Assignment.

The charge is a charge upon the weight of evidence, and is in itself an incorrect proposition of law.

Statement.

The court said "the defendants * * had continued to assert

ownership to the lands under said power" found in the old trunk. (Trans., p. 48,) This the plaintiff denied, and objected to the paper on this ground. (Trans., p. 47.) The record shows these acts were done under the copy of the Mexico original furnished Hammekin. So he swears. (Trans., bottom p. 38.) That these acts were done under the old trunk paper the court charges as proven; whereas, the plaintiff contended, and the defendants show, they were done under the City of Mexico paper. The court enumerates the facts, and if found true, states them as sufficient. This was a question for the jury.

Authorities.

Beaumont P. Co. v. Preston, (65 Texas, 450), says: "In this connection it may be remarked that it is not a correct practice for the court to charge the jury that such and such proof constitutes *prima facie* evidence of the execution or genuineness of the paper in question. * * * With respect to an instrument offered as ancient, the jury should be informed of the conditions upon which the law dispenses with the ordinary methods of proving the execution of private writings, but whether the conditions exist or not, and whether the circumstances proved corroborate the antiquity and genuineness of the paper are sufficient, after the court has heard enough to make the issue, should be determined by the jury as any other fact."

Meegan v. Boyle, 19 How., 130: "But whether the title be a genuine instrument or not, it has not been treated as valid, as no claim has been set up under it, and all the heirs" (although claiming the land) "have acted in regard to the estate of their father as though he had died intestate. * * "The will cannot be admitted in evidence without proof."

C. & O. Canal Co. v. Knapp, 9 Peters, 567: "The facts should be left with the jury, whose peculiar province it is to weigh the evidence and say what effect it should have."

Tracy v. Swortout. 10 Pet., 96: "That the jury considered this direction as controlling their verdict is clearly shown * * * . It covered the whole case, and must have been received by the jury as a direction on the law of the case. In what other light could they have considered it? * * The facts of the case were clearly established * * and the amount of damages was the only matter for the investigation of the jury. On this point the jury should have exercised their own discretion, *aided, if necessary, by the opinion of the court* in relation to matters of fact * * . But the jury were told as the effect of the whole evidence that they ought to give nominal damages only."

Greenleaf v. Brith, 9 Pet., 399: The court "cannot legally give any instruction which shall take from the jury the right of *weighing the evidence and determining what effect it shall have.*"

E. T. Line v. Hope, 95 U. S., 403: The trial court charged an opinion in the words "I believe" and afterwards said he "did not undertake to fix the value," but that "the jury would be justified in finding accordingly." Held, admissible, and not error.

Argument.

There is no contention on the part of the plaintiff that the defendants' vendors went on the land about 1850, and did all the acts necessary to establish an ancient instrument. But if another of these original powers were discovered to-day, and never held contemporaneously with these many acts of possession, the plaintiff denies that such acts could sup-

port a paper so recently found. If not, then a paper found long after this action was begun, cannot be sustained by acts done under another power while it was shut up in an old trunk.

The plaintiff admitted most of the facts, and denied their sufficiency. The court submitted the issue of proof of the facts, and charged them as sufficient and applicable to the old trunk paper.

The jury must not only find the existence of the facts, but are permitted to say whether or not they are sufficient to establish the further fact that the instrument is genuine, and not forged. Whether certain facts, if proven, are "equal to the direct testimony of one witness to the signature of Miguel Rabago" is a question to be decided by the jury, and is not the prerogative of the court to say. The jury may have found all these facts enumerated by the trial court, fully proven. Yet, the defendants show by their evidence, and the jury doubtless believed, that they related to another paper, and that they were wholly insufficient to satisfy their minds—to the degree that one witness "to the signature of Rabago" would have done. The plaintiff had the right of trial of this issue by jury, which was denied him by the charge of the court, deciding as matter of law, a conclusion which was one purely of fact, to be found by the jury.

Beaumont Pasture Co. v. Preston (*supra*), decides the issue "whether the circumstances proved to corroborate the authority and genuineness of the paper are sufficient, after the court has had enough to make the issue, should be determined by the jury as any other fact."

It is true the court may aid the jury by his opinion of the facts, *but "they should be made to distinctly understand that the instruction was not given as a point of law by which they were to be governed, but as a mere opinion as to the facts, and to which they should give no more weight than it was entitled to."* Tracy v. Swortout 10 Pet., 96.

The jury are told that certain evidence is before them, which, if they find to be true, "you may consider equal to the direct testimony of at least one witness." It is not stated as an opinion of the court aiding the jury, making them distinctly understand that the instruction was not "a point of law," but it is charged in the terms of a legal conclusion drawn from the evidence by the court, if the jury should find the evidence true. The jury cannot hold that this is merely an opinion of the court on matters of fact "to which they should give no more weight than it was entitled to," but it is spoken with authority as the law applicable to the facts, if found by the jury to exist.

The plaintiff has clearly suffered injury by this charge—it being a conclusion of law and fact, and erroneous.

Seventh Assignment.

The court erred in charging the jury upon the legal effect of the old trunk power.

Statement.

The charge (Trans., pp. 50 and 81) construes this paper to be sufficient to prove the title, if genuine.

Argument.

This error has been fully discussed under the fourth assignment, wherein the issues arising upon this paper were considered, and the plaintiff here cites the proposition, authorities and arguments thereunder presented, and refers to that assignment. (*Ante*, p. 21.)

Eighth Assignment, First Proposition.

The court erred in submitting the Hammekin copy of said City of Mexico paper to the jury for any purpose. (Trans., p. 54), because—

1. There is no evidence of the execution of the original used by Blanco.

2. The certificate does not show it to have been an archive.

3. If genuine the original would not have proved title in 1832 and 1836.

4. It was immaterial that such a paper was in Hammekin's possession at any time, and tended to mislead the jury to supplying a seeming pretended certified (legal) copy of the power of attorney to Blanco.

5. There could have been no such thing as a true certified copy of the original power (whether true or false), it never having been an archive of any officer. (Trans., p. 54.)

Second Proposition, Eighth Assignment.

The plaintiff asked the court to instruct the jury:

"The jury is instructed at the request of the plaintiff, that the copy of the copy of the power of attorney said to have been in the possession of Hammekin goes to the jury only for the purpose of showing that he had such a paper in his possession, and cannot be relied on as a muniment of title by the defendants,"

Statement.

This Hammekin copy is a copy made by Hammekin of a copy of the City of Mexico paper furnished him by Prioland. It is a copy of a copy and is as follows: (Trans., p. 37.)

Translation.

Third-class seal. O Two reals. For the years one thousand eight hundred and thirty-six and thirty-seven.

"MONCLOVA, *8th June*, 1832.

"SENOR DON VICTOR BLANCO.

"MY ESTEEMED UNCLE AND SIR: With this I hand you (literally I accompany to you) the testimonio of eleven leagues of land which his excellency the governor of the State granted to me a sale of in the department of Texas, in order that you may have the goodness to do whatever should be in your power, so that possession may be taken of them by yourself or by a person of your confidence, giving to you the most ample power, so that you may cultivate them, may sell them, may exchange or alienate to your entire satisfaction, because for everything I authorize you—and I will stand and I will pass in all time for that which you should do; and should this my letter power not be sufficient, I will grant judicially as soon as you please and notify me that you require it, and you excusing this trouble, I place myself at your disposal as your most affectionate nephew and servant, who attentively kisses your hands.

"MIGUEL RABAGO (rubric)."

"I, the undersigned clerk, do certify that the foregoing copy is, to the letter, the same as the original power that Don Victor Blanco has presented

to me, and the same that I had before me when making out the bill of sale, that on the twenty-fifth day of May, of the year one thousand eight hundred and thirty six, made by virtue of it to Don Guillermo Laguerenne of eleven sitios of land situated in the department of Texas, on the west side of the Brazos river, above the road that leads from the town of Nacogdoches to Bejar, as it appears in the public records in my charge. And so that this be of value wherever required, and at the request of the party interested, I issue duplicates of the present in Mexico the seventeenth day of March, one thousand eight hundred and thirty-seven, being witnesses Dn. Rafael de Revilla, Dn. Teofilo Careno, and Dn. Flipe de Revillo Olivares, of this community.

(Signed) "MIGUEL DIEZ DE BONILLA,
"*Notary Public.*"

This paper called the "Hammekin copy" was made by Geo. L Hammekin, a witness for and previous vendor of defendants, being a copy of the paper handed his agent, Rose, which paper Rose lost. This last paper was sent to Hammekin by Prioland after his sale, as the attorney of Laguerenne, to Hammekin. It was itself a copy which the notary says is "to the letter the same as the original power that Don Victor Blanco has presented to me, and the same that I had before me when making out the bill of sale * * * as it (the bill of sale) appears in the public records in my charge." (Trans., pp. 37 and 43.)

It is not certified as a copy directly of anything, but may be made from memory, which appears to be the case.

Argument.

This copy was before the jury with a defective certificate, but in connection with the charge of the court as to a "legal copy" of the old trunk paper (Trans. p. 53 and ante fifth assignment), required other instruction as to its legal effect. By its terms it gave Blanco power to sell, but went to the jury over plaintiff's objection, and was immaterial as to the old trunk power, as the evidence makes it a copy of the copy of the City of Mexico paper—which was itself an original, and not a copy of the old trunk power. This fact is shown by the notary's certificate to the Hammekin copy: "I certify the foregoing copy is to the letter, the same as the *original* power."

This Hammekin copy misled the jury and supplied to them the fictitious evidence upon which the court charged, as complained of in the fifth assignment, that a "legal copy" could have been had by Rabago. The court should have excluded this paper, or have given the charge asked to guide the jury as to this immaterial evidence.

Ninth Assignment.

The court erred in submitting to the jury *the copy* of Blanco's deed to Laguerenne dated City of Mexico, May 25, 1836 (Trans. 208) and *the copy* of Laguerenne power to Prioland. (Trans. p. 62.)

Statement.

These copies were made in 1884 by the notaries claimed to be the custodians of the original records. The contents of these papers are not in question, and need not be here copied. The

Blanco deed is certified to in proper terms by the pretended successor of the notary, Bonilla, before whom it was found.

It is not shown to be an examined copy, and the notary Landgrove shows he holds it by virtue of the law of November 29, 1867. (Trans., p 56.)

The notary Ferreira, who is claimed to be the custodian of the Prioland power subscribes the following to the copy: "and in conformity with the order of the citizen judge of the sixth civil court, licentiate Ysidoro Guerrero, in the decree to which the inserted certificate refers, I issue the present as custodian of the notarial records of the notary, Don Francisco de Madriaga, in the City of Mexico, fifteenth December, 1874. I give faith (seal) Antonio Ferreira (rubric.") (Trans., p. 63.) There is no pretence of proving this, an examined copy by any witness. The evidence is found on page 56 transcript.

First Sub-Division, First Proposition, Ninth Assignment.

The notaty holds the record original of the Blanco deed by a foreign law of November 29, 1867, and this law should be proven by an authentic copy of the act, to establish the fact that Landgrove is the proper custodian of this record.

The notary, Ferreira, does not show by testimony or certificate, by what authority he holds what the defendants claim to be original record. (Heretofore considered. See Third Proposition, First Assignment.) R. p 60 — ante p. 9.

Second Sub-Division, First Proposition, Ninth Assignment.

The Blanco deed and Prioland power are not examined copies, and the latter is not a certified copy, nor is the latter supported by any evidence of the identity of the records, the genuineness of the signature of Laguerenne, or any other fact of a confirmatory nature.

Authorities.

"A record copy issued and certified to at a later date by the keeper of the archives, or a sworn copy of the original archives, might likewise be introduced. accompanied with some such confirmatory evidence of the genuineness of the grant," but cannot otherwise be introduced." State v. Cardinas, 47 Texas, 291.

Broxen v. McDougal, 63 Texas, 193: "A copy of the record so made was not admissible, as there was nothing to show that the original instrument was one of which a certified copy could be made."

Argument.

The custodian of a record must be shown to be a *legal* custodian; and until shown to be such his certificate is of no force, but he must make proof by deposition of the fact that the copy is an examined copy, as any other witness may do. Neither Laguerenne nor Ferreira is shown to be a legal custodian, and should establish their records by an examined copy.

But if properly certified, it is required by the rule in the Cardinas case, 47 Texas, 291, that confirmatory proof of the existence, genuineness and legality of the record be made.

In the face of this recent opinion the Supreme Court of Texas, in passing on the Prioland power (Williams v. Conger, 49 Texas, 582), say that it is duly certified, and ignore the rule in the Cardinas case requiring confirmatory evidence. The record shows it not to be a certified or examined copy and not to be confirmed by other evidence.

The Supreme Court of Texas holds the Prioland copy properly proven, and refers to Waters v. McGrew, 16 Texas, 512 (49 Texas, 600), as its authority. The copy in that case was authenticated according to act of Congress in the sister State of Louisiana, and cannot support a copy of a *foreign* record. As to this copy, it is not certified to as a copy, the record is not identified, no proof of the genuineness of the handwriting of Laguerenne or the notary, before whom the power was executed, is offered, and the record wholly fails to satisfy the rule laid down in The State v. Cardinas, 47 Texas, 291.

Tenth Assignment.

(The plaintiff is aware that the proposition here contended for has been more than once decided, but respectfully asks a consideration of the following authorities.)

The court erred in refusing to instruct the jury upon the issue raised by the evidence tending to show the alienage of Laguerenne at the date of the deed to him, the charge asked by plaintiff in error being as follows:

1. "The jury are instructed at the request of the plaintiff, that on the ~~26th~~ day of May, 1836, at the date of the deed from Blanco, as attorney in fact for Miguel Rabago, 'no alien could hold land in Texas,' and a deed to an alien would have been null and void.

2. "If you believe from the evidence that Laguerenne, to whom Blanco purported to sell, was an alien to Texas, and a resident citizen to the City of Mexico, then you are further instructed that you must consider such sale invalid and a nullity, and you will find for the plaintiff." (Trans., p. ~~32~~ 67)

Statement.

Texas had declared her independence and was a separate Republic on March 2, 1836. As such, she was a foreign government from Mexico, the United States and France.

Hammekin testified, (Trans., p. 66), "I am well acquainted with Laguerenne * * . I do not recollect whether Guillermo Laguerenne was a Frenchman or an American * * . I don't think he ever lived in Texas." It is not pretended that he was a citizen of Texas

Authorities.

Texas Constitution March 17, 1836, sec. 10: "No alien shall hold land in Texas except by title emanating directly from the Government of this Republic." This was the law of Texas, before the Republic, as is shown by the following authorities, the only question being as to aliens holding until *office found*.

Clay v. Clay, 26 Texas.
La Coste v. Odom, 26 Texas.
Barrett v. Kelly, 31 Texas, 481.
Moore v. Phillips, 100 U. S., 603.
Osterman v. Baldwin, 6 Wall, 116.
Jones v. McMarters, 20 Howard.
Mathews v. Merle, 26 Cal., 475.
Andrews v. Speers, 48 Texas, 568.
1 Pasch. Dig., note to Const., 845, 310.
Bomer v. Hicks, 22 Texas, 162.

Argument.

The alienage of Laguerenne defeats the defendant's title. He could neither take nor hold lands on May 25, 1836. It is true this court, as well as the Supreme Courts of California and Texas have, held that an inquest of office was necessary to divest title, but erroneously, as is respectfully submitted. Will this court briefly review and carefully consider the opinions

heretofore rendered? In Clay v. Clay, and La Coste v. Odum, 26 Texas, 24 and 458, it was held, by one of the ablest courts ever organized in Texas, that a conveyance to an alien was a nullity under Mexican law, and passed no title. The opinion of these judges are now respected in Texas as more authoritative in the laws governing Texas under Mexican rule than any since delivered. These two cases were decided *in 1861*, but on account of the disturbances of the war were not reported *until 1867*.

In the meanwhile, before their publication—or ignorant of them—Kelley v. Barrett, 31 Texas, 481, came on for hearing before the Texas Supreme Court in 1868, at the time presided over by weaker judges than ever sat on that bench. They decided that a sale made April 13, 1833, when Texas was a part of Mexico, must be "based on the common law of England," when the trial is had after the adoption of the common law into Texas in 1840. No proceeding, such as inquest of office, was known to Mexico. The *denouncement* of that law is mistakenly said to be its analogy. No idea could be more fallacious. Proceeding by inquest of office is a method afforded the State, of establishing the sovereign right to forfeitures at common law. Denouncement is the proceeding in Mexico by which a Mexican may become possessed of public lands already forfeited to the sovereignty.

The inquiry may incidently determine that the land has been forfeited, but it never arises on the part of the government to try that issue. Under Mexican law we find frequently the right of Mexicans to denounce lands—abandoned or forfeited *by original grantees*—but the government is invested with right *ipso facto*, creating the forfeiture, and awaits the act of an individual desiring the benefit of abandoned land to *denounce* it.

No case, previous to Barrett v. Kelley in Texas, and no proposition of law in Mexican writings, has been found, which hold that a forfeiture to the government takes place when—between individuals—a sale to an alien was made in Texas prior to 1840. Here the sale is a nullity, and the vendor passes no title. The analogy holds good in a grant from the State—the grantee forfeiting the title, it returns to the sovereign grantor. In a sale by an individual to an alien, the sale is a nullity, no forfeiture takes place to the State, but the grantor retains title, none ever having passed. Clay v. Clay, 26 Texas, 24. There was no proceeding by way of inquest of office in Texas under Mexican law, and the defendant is challenged to show authority for it outside of the cases herein reviewed.

"Kelley v. Barrett is decided on the authority of the common law, and the very lucid reasoning in Johnson v. Smith, 21 Texas, 724, and Bowman v. Hicks, 22 Texas, 159, with which it is presumed" said the court, the district judge was not conversant "as they were not reported until after the trial below." Turning to these cases, they decide only that in construing the conditions annexed to grants to *settlers'* abandonment by the *original grantee* worked forfeiture, which restored the land to the public domain "without judicial inquiry," and that non-performance of other conditions should be ascertained "by judicial inquiry in some mode *to be provided by law.*" No mode then existed—but should be provided. Barrett v. Kelly is decided upon these cases, and they not only do not support the opinions, but show that no mode then existed for such inquiry, but *should be* provided by law, and that abandonment worked a forfeiture *ipso facto*, without adjudication. Resting immediately upon *Barrett v. Kelley*, Judge Field delivered the opinion in *Phillips v. Moore*, (100 U. S., 603) 10 Otto, 208.

Clay v. Clay and *La Coste v. Odom*, (26 Texas) are referred to, but without the consideration due the learned judges, who rendered the opin-

ions establishing *the rule of property in Texas* as to alienage in 1836.

Barrett v. Kelley was decided by a weak court upon the authority of the common law, *Bomer v. Hicks* and *Johnson v. Smith*, cases which decide a different question, and hold that no such mode of inquiry as inquest of office existed in Mexico. In Phillips v. Moore, Sims, the original grantee had sold to Kineben Holliman, an alien, Dinsmore denounced the land, receiving a title from the State. Judge Field says that Holliman's vendees are defeated by Dinsmore's denouncement and grant from the State. This is the only logical result which could follow.

But Clay v. Clay goes further, and says that Sims' heirs could also have recovered from Holliman, that if Sims, or Dinsmore or Rabago's heirs show title from the State, an alien cannot defeat that title, when it appears that he is an alien.

Matthews v. Merle, 26 Cal., 475, is cited in Moore v. Phillips. Upon investigation it is found the sale was made in 1844, and involves the construction of the law of 1842; yet, it states in support of Clay v. Clay, that the law of 1825, under which Rabago was granted the land in question (in Williams v. Conger), encouraged the purchase of public lands *by settlers*, but *discouraged sales by individuals to foreigners*.

Whatever may be the law of California, *we are seeking the rule of property in Texas*. But the California court in that case cites Schmidt's civil law, 346, which is in exact accord with Clay v. Clay, as follows:

"Property acquired by non-naturalized foreigners in fraud of this law may be denounced by *any Mexican*, to whom it will be adjudged as soon as such fraud is proved." The procedure requisite in denouncement, an extra judicial matter, determined not by the courts, but the executive department of the government by an ex parte proceeding, and not by an issue between the sovereignty and the alien. By inquest of office the trial is before the court and title is divested; by denouncement, the alien having no title, as to him it may be denounced "by any Mexican." It will be adjudged to this Mexican upon proof of fraud—title not being in the fraudulent alien—but the law does not say the title will be divested from the alien upon proof of fraud. There is no title in him for divestiture. Clay v. Clay says he never was invested, and such is the law of Texas as applicable to sales to aliens in 1836. A striking instance of this doctrine is revived by the Texas Legislature whereby the Commissioner of the Land office by an endorsement "Land Forfeited" on the obligation of the original grantee forfeits the land to the State "without the necessity of re-entry or judicial ascertainment" and the land shall be resold. (Texas Leg. Acts of 1887, p. 86.)

Here the old Mexican principle is resorted to as it existed prior to the introduction of the Common Law into this State.

Osterman v. Baldwin, (73 U. S., 73) 6 Wall., 116, holds that the alien vendee can only be divested by office found at common law, quoting Cross v. Del Valle, 1 Wall., 8; a case decided under the common law mode of procedure, which is as well settled as any rule can be. But under the Mexican law *Osterman v. Baldwin* has been erroneously decided, and authority for the doctrine therein held cannot be found, except in the misconceived opinion that a mode of inquiry similar to inquest of office existed, and its adjudication was required to divest title from an alien grantee, under the Mexican law. This case (6 Wall., 116) cites White v. Sobriego, 24 Texas, 256, holding that an alien cannot bring suit, and Jones v. McMasters, that the dissolution of Texas from Mexico did not divest title. These authorities do not touch the question, and Osterman v. Baldwin is without authority derived from the law as it existed in Texas in 1833. Lee v. Salinas, 15 Texas, 496, declines to decide the point, but when 26 Texas is reached

the question is passed upon, the authorities reviewed, and the learned court settled the issue, and no Texas court has ever reversed the opinion therein rendered, nor did your Honors in Phillips v. Moore, 100 U. S., 603, throw any additional light upon their reasoning, viewed from the standpoint of the early law of Texas based upon the principles of Mexican jurisprudence, and any opinion there contained intimating a contrary view is *dictum* merely, since in that case there was a denouncement, and the question arose between the alien and a grantee from the State, and not between the alien and the heirs of his vendor.

Andrews v. Spear, 48 Texas, 568, cites Osterman v. Baldwin, and ignores Clay v. Clay. This is the last case from the Texas court involving this question, as Moore v. Phillips is the last in th United States Supreme Court. Both rest upon case law not applicable to alienage and its consequences under the laws of Texas existing on May 25, 1836, and it is hoped this opportunity may be taken to point out the fallacy in Clay v. Clay, if there be such, and that the sources of the Mexican law be explored and cited in support of the doctrine held in the line of decisions above, none of which have in terms overruled the two cases presented in support of the charge asked and refused on the alienage of Laguerenne. (Clay v. Clay, and LaCoste v. Odom, 26 Texas, 24 and 458.) If your Honors are content with mere array of recent authority, unsupported by the principles of early law, which existed on the day Blanco sold to Laguerenne, then this assignment is not well taken.

But in reviewing the cases of Barrett v. Kelley, Andrews v Spears and Osterman v. Baldwin, absolutely no reason is given for the opinions of the courts—excepts so far as based upon the common law inquest of office, which the Calafornia case of Matthews v. Merle proves inapplicable. And this case evades the issue by attempting to distort the proceedings by denouncement into an analagous method of arriving at the same result.

Laguerenne was an alien to Texas and took no title on the 25th of May, 1836. But in Moore v. Philips it is said that if the alien does not take the title, "certain it is that the vendor was deemed to be divested."

This is not the conclusion reached by the Supreme Court of Texas in Clay v. Clay. On the 18th of March, 1831, the State granted to Nestor Clay the land in controversy in that case. Tacitus Clay bought of him on the 15th of May, 1830. The heirs of Nestor Clay claimed the land and brought action therefor. This involves the law as it then existed The case at bar is strengthened by the 10th section of the Constitution of March 17, 1836: "No alien shall hold land in Texas except by title emanating directly from the governmeut of this republic." The Blanco-Laguerenne deed bears date May 25, 1836. The court holds in Clay v. Clay, that if Tacitus Clay "was an alien and non-resident * * * he had no capacity to take the land or acquire any kind of title to the same, and that the sale by Nestor Clay was a *nullity*." If Laguerrenne was an ailen in 1836, "he had no capacity to take the land or *acquire any kind of title* to the same and the sale by Blanco was a nullity." If a nullity, no title passed and Rabago was not divested. Under common law doctrines the sale passed a defeasible title; under Mexican law the sale to an alien was a nullity and passed no title. The principles governing the two are wholly at variance with each other.

Attention will be called by the defendants to the opinion of the Supreme Court of Texas, rendered in this case. (49 Texas, 582). The plaintiff asks its careful consideration in the light of the record. It discloses a gross misapprehension of the questions presented; a frequent recital of facts not in evidence, but

based on supposition, and a partisan argument for the defendant's use, which has well served its purpose.

The present record discovers the justice of this criticism, or relieves this court from the rule *stare decisis* by showing that this record differs widely from that before the Supreme Court of Texas.

The judge delivering the decision of the latter court said:

"I must admit that I am inclined to the opinion that the want of title in appellant is so manifest from the entire record as to authorize an affirmance of the judgment, notwithstanding the error, etc."

Does the want of title in plaintiff appear by authority from Rabago, under—

1. The identical paper found in Samuel May Williams' trunk, in Galveston in 1886, as is claimed by the defendants theory? (Trans., p. 54.)

2. Or a "legal copy" thereof, taken by Blanco, before sending the original to Samuel May Williams, as seems to have been the theory of Judge McCormick, from whose judgment this writ is taken? (Charge of court—Trans., p. 51 and 52.)

3. Or another power of like effect which the Supreme Court of Texas says Blanco appears to have taken the precaution to have from Rabago? (49 Texas, 595.)

These three theories are inconsistent with themselves, inconsistent in the record, and well illustrate the difficulty which must be encountered in the effort necessary to sustain a title, three muniments of which are not on record in Texas to-day, and have been in part supplied by papers unheard of by the parties in the cause until this action had been brought and once tried. (Trans., p. 44–58–62.)

SUMMARY.

Plaintiff calls special attention to the error of the court below:

1. In admitting the pretended application of Rabago to the jury for comparison of lands. (Trans., p. 28, ante p. 9 bottom.)

2. In admitting the old trunk power as an ancient instrument under evidence shown to be applicable *alone* to the City of Mexico paper. (Trans., p. 47, ante p. 21.)

3. In charging the jury that Blanco could have obtained a "*legal copy*" of the old trunk power, *without evidence* of such legal copy. (Tr., p. 47, ante p. 37.)

4. In holding the old trunk power sufficient to pass title in 1836.

5. In refusing to charge that the alienage of Laguerenne made the sale to him void, but—

6. In doing so prays your Honors to investigate the record carefully, and to render a decision finally determining these vexed questions, upon which plaintiffs' authorities differ so widely from the opinion of the learned judge before whom the cause will be probably reheard under your Honors' instructions, when reversed and remanded for new trial.

EUGENE WILLIAMS,

Of Counsel for D. H. Williams, Plaintiff Below and in Error.

125-397

125 - 397

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

D. H. WILLIAMS
vs.
E. D. CONGER *et al.*, } No. 105.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

Brief for Defendants in Error.

E. H. GRAHAM,
Attorney for Defendants in Error.

R. O. POLKINHORN, PRINTER.

SUPREME COURT OF THE UNITED STATES.

D. H. WILLIAMS
vs.
E. D. CONGER *et al.*, } No. 105.

Brief for Defendants in Error.

Statement of the Case.

We cannot adopt the statement of the case made by plaintiff, and make one of our own.

D. H. Williams, plaintiff in error, brought this suit in tresspass to try title in the District Court of McLennan County, Texas, a State Court, on September the 11th, 1873, against E. D. Conger and others to recover the eleven leagues of land in that County granted to Miguel Rabago by the State of Coahuila and Texas.

The defendants filed the statutory plea of not guilty, and also pleaded the statute of limitations and stale demand.

On a trial had in the District Court in 1876, verdict and judgment went for the defendants, and the case was appealed to the Supreme Court of the State, and in 1878 the case was reversed and remanded by

that Court on account of an error in the charge. (*Williams* vs. *Conger*, 49 T., 594.)

The case was then removed into the United States Circuit Court in Waco, in said McLennan County.

On the tenth day of April, 1884, the case again went to trial in the Circuit Court, which again resulted in a verdict and judgment for the defendants, from which this writ of error was prosecuted.

The original *protocol* of the title to Rabago was found by plaintiffs in 1874, in the old archives pertaining to land grants in Texas, in charge of the Secretary of State of Coahuila, in Saltillo, Mexico (Rec. 22), and it was filed in the General Land Office of Texas in June, 1875 (Rec., 13); and plaintiff, on the trial, put in evidence a Land Office copy of this protocol as his first paper in his chain. Though there was no law authorizing the filing of this paper in the Land Office, objection was not made to the copy on that ground.

The plaintiff then, after introducing evidence tending to show that Rabago died in 1848, and that Rosa Cortez was his widow and only heir, put in evidence a deed to himself from her and her second husband, dated July 26, 1873, and closed. (Rec., 13.)

The defendants put in evidence the following chain of title.

1. The original application of Miguel Rabago to Viesca, the then Governor of Coahuila & Texas, dated November 28, 1828, for the purchase of eleven leagues of land under article 24 of the colonization law of the 24th of March, 1825, together with the original concession or sale by Viesca to Rabago of date Decr. 2d, 1828, endorsed on it, selling to him the land asked for, to be located in Texas at whatever point he might select, and directing the com-

missioner to put him in possession and to extend to him his title. This paper was obtained from the same archives in Saltillo, Mexico, from which the protocol of the title was obtained, and the petition has appended to it what purports to be the genuine signature of Rabago and the concession what purports to be the genuine signature of Viesca and of Del Valle, his Secretary of State. (Rec., p. 19 & 20.)

2. A power of attorney (in the shape of what is known in Mexican titles as a letter power) from Rabajo to Victor Blanco, his uncle, dated on the 8th day of June, 1832, handing to him the testimonio of said concession, and authorizing him in person or by agent to do whatever was necessary to get possession of his land under it and authorizing him personally to sell the land. On this is an endorsement by Blanco, substituting Samuel May Williams for the purpose of getting possession and procuring title only. (Rec., p. 35, 36.)

3. The original testimonio of the final title extended to Rabago on this application and concession by Aldrete, the commissioner, dated Jany 13, 1834 (Rec p 23), which contains the same papers as the copy of title introduced by plaintiff (Rec., p. 9 12) which shows that the concession was located, surveyed and patented on the application of said Williams (Rec., p. 9.)

4. A deed from Rabago by Blanco as agent to Guillermo Laguerinne, dated May 25, 1836, conveying the whole grant. (Rec., p. 7.)

5. A power of attorney from Laguerinne to Francisco Prioland, dated January the 10th 1837, authorizing him to sell the land. (Rec., p. 7.)

6. A deed from Laguerinne by Prioland to Geo. L. Hamekin, dated February 15th, 1837, conveying the whole grant. (Rec., p. 7.)

7. A deed from Hamekin to Goodrich, dated April 24, 1850, to an undivided half of the grant. (Rec., p. 7.)

8. A deed from Hamekin to Hargous, dated Nov. 25, 1858, conveying the other half. (Rec. p. 7.)

9. Powers of attorney from Goodrich and Hargous to Thomas Harrison and a conveyance by him to the defendants, dated February the 5th, 1873. (Rec., p. 7.)

These constituted the defendant's title papers introduced in evidence in the order above set out.

The original application of Rabago with the original concession of Viesca endorsed on it—the first paper offered by us as shown above—was offered and was admitted in evidence as a muniment of title, and its admission was objected to by plaintiff on the various grounds set out in their bill of exceptions, two numerous to attempt to set out here.

The letter power of attorney from Rabago to Blanco—the second paper offered by us as shown above—was offered as an ancient instrument in connection with proper evidence to prove it up as such, and was admitted by the Court, over numerous objections made by plaintiff as shown by his bill of exception.

The signature of Rabago to this power was attacked as a forgery, and the Court by its charge allowed the jury to compare it with his signature to the said original application, already in evidence, to aid them, in connection with the other evidence, in determining whether the signature to the power was genuine

or not. This was objected to by plaintiff and a counter charge asked.

The deed from Rabago by Blanco to Laguerinne was offered as an examined and certified copy, and the admission was objected to as not being admissible as such.

The power of attorney from Laquerenne to Prioland was offered as a certified copy, and it was objected to as such.

The questions seriously insisted on by plaintifi in his brief are raised on the admissibility of these four papers, and on the charge of the court and on charges refused by it relative to the proof of said power as an ancient instrument and relative to the use of Rabago's signature to said original application for purposes of comparison.

Brief of the Argument.

I.

The original petition of Miguel Rabago to Governor Vissca seeking to purchase eleven leagues of land and Viesca's original concession endorsed on the same were properly admitted in evidence. (Rec., 19.)

Though the manner in which sales were made and the formalities with which titles were extended to purchasers of these eleven league grants under the collonization law of 1825, are well known to this court, it may save time hereafter to state it very briefly here. The person wishing to purchase presented a petition in writing to the governor, representing that he wished to purchase under the law. The governor, if he found the petitioner

qualified, &c., made an endorsement in writing to that effect, called the concession, on the petition or on a paper attached to it, and directing that the commissioner appointed for that purpose by the government put the purchaser in possession and extend to him his title, &c. The Secretary of State made a certified copy (testimonio) of this petition and concession and delivered it to the purchaser, as evidence of his purchase, and filed the original (or protocol) away in its proper place in the archives of his office, where it remained as an archive. The purchaser then in person or by an agent, selected his land, carried his copy of the concession to the commissioner, and made a written application to him to have the land surveyed and that he be put in possession. The commissioner, if every thing was found correct, directed the surveyor general to make the survey and return to him the field notes, and a plat of the land. After these were returned and found correct, the commissioner endorsed his final approval on them, and wrote out on them, or on a separate paper, the final title in form and executed it. These several papers, to wit, the said copy of the original petition and concession ; the application for survey and possession with the order of survey; the field notes and plat with the commissioners approved ~~x~~ and the final title were all fastened together—generally stitched together—in the form of a book. The commissioner then made a certified copy (or testimonio) of this book (or protocol) in due form, delivered it to the purchaser as evidence of his title, and put him in possession and returned the original book (or protocol) to the Secretary of State,

who filed it away in the proper place in the archives in his office, which completed the sale.

Now the paper—the admissibility of which we are considering — is this original petition of Rabago to Governor Viesca asking for a sale to him, with Viesca's original concession over his own hand endorsed on it, which was filed away in the archives in Saltillo, Mexico—then called Leona Vicario, (Rec. 15)—by the Secretary of State, Dell Valle, on December the 2, 1828, when the concession was granted to Rabago, and the copy made for him. A copy of a copy of this original appears as the first paper in the Land Office copy of the title put in evidence by plaintiff as his title, (Rec. p. 8). The first or original copy from which this was taken and which was delivered to Rabago on December the 2d, 1828, being in the book (or protocol) returned by the Commissioner to Saltillo in 1834, but, removed and filed in the Land Office in Texas in 1875.

So that this paper, which we introduced in evidence, is this original petition and concession—the matrix of all the others, and the first or initial paper employed by Rabago in acquiring title to this land. It is the basis on which the whole title rests.

That this is such original paper is conclusively shown, and, I might say, is not controverted by the record. Jose M. Musquiz, the Secretary of State of Caahulia, Mexico, and keeper of said old Texas archives, certifies that it is such original paper, and the U. S. Consul at Saltillo, certifies that he is such Secretary of State (Rec. 19–20), and Said Musquiz and Estiban Portilla, his archive keeper, testify, in substance, by depositions taken in August, 1881, to which they attach the paper, that such of the old papers, rec-

ords, protocols, archives, &c., pertaining to land and land grants in Texas as still remain in Mexico, are kept in the office of archives in the official custody of the Secretary of State in Saltillo; that this paper is the original petition of Rabago and concession of Viesca, (a protocol), and is a public archive in said office and was taken from it by them; that they were familiar with the signatures of Viesca and his secretary, Del Valle, and this paper bears their genuine signatures. (Rec., p. 14, 15,) Ex-Governor E. M. Pease of Texas and Andrew Neill an old Texas lawyer, testified that they are acquainted with the handwriting of Viesca and Del Valle, and that their signatures to this paper are genuine. (Rec., p. 16 and 17.) John Willett testifies that the paper was hunted up by Mesquiz and Portilla, at his instance, and the first time he saw it, it was in their office and he got it from them. (Rec., p. 18.)

An interpreter testified that the petition and concession in the Land Office copy of the title put in evidence by plaintiff was a good translation of this protocol, (Rec., p. 18,) and that the copy of the petition and concession found in the original testimonio of the title put in evidence by us is an exact counterpart or copy of this original petition and concession. (Rec., 23.)

This paper was admitted in evidence on this testimony which was on file over two years before the trial and no effort was made to disprove it or contradict it in any way, when it was offered.

After it had been admitted in evidence however and after the defendants had introduced all of their other evidence in chief and had closed their case, the plaintiff introduced the depositions of Ramon

L. Flores, who testified that in the fall of 1874 he was Chief Clerk in the office of the Secretary of State of the State of Coahuila and searched all of the archives in Saltillo thoroughly for plaintiff and found the original protocol of the title which was deposited in the land office in 1875 as before stated. The inference from what he says is that he did not find the paper we offer, but he does not say so in so many words notwithstanding plaintiff announces repeatedly that he does (Rec 22), and the probability is that he did not search for it, because the paper he found is what piaintiff needed to show the title in Rabago and that is what he searched for doubtless. This evidence and this only plaintiff offered to rebut defendant's proof of the genuineness of the original petition and concession, and we respectfully submit that it amounts to nothing. The records were then out of order (Rec 15. 15). The space to be examined was eight yards or twenty-four feet square (Rec 22). Flores was not the archive keeper (Rec 22) and probably did not understand them. It took him ~~twenty days to find the original~~.
twenty days to find the original protocol of the title, a document of five or six leaves (Rec. 22), and may very well have overlooked this, if he had searched for it, and, as before said, it is not sure that he did, and he does not say that he did not find it.

It is worthy of remark, too, that plaintiff repeatedly in his brief calls attention to the fact that living witnesses swore that Rabago's signature to the power to Blanco was not genuine; but he nowhere explains why he did not also prove by these witnesses that the signature to this petition was not genuine. And it was in evidence that Rabago was

n Saltillo when the original concession was issued, (Rec. 18 & 23), and the presumption is that he signed the petition, and that his signature thereto is genuine.

The first three objections offered by plaintiff to the introduction of this paper are presented under the first clause of his first assignment of error (Ptff's Brief, p. 2), and we respectfully submit that the assignment of error does not set out the error separately and with that particularity required by the rule; and we respectfully submit that most of his assignments of error are subject to the same objection and especially the second, third, fourth, sixth and seventh.

1. The first objection interposed is because "it is irrelevant and forms no part of the defendant's title" (Rec., 21). Plaintiff scarcely presents this objection at all in his brief, and perhaps we might treat it as abandoned, but, if the court will consider it, we respectfully submit, that there is nothing in the objection. This paper was the first paper offered by us in dereigning our title, and was admitted by the court as a part of our title. (Rec., p. 18.) The petition and concession in some form is an essential part of an eleven league title, and no such title is valid without them. It is the first paper in a perfect eleven league title, as shown above, and must be adduced in evidence in same form in making out a valid eleven league title. In Mexican titles much more stress is placed on the original grant or concession than is now in Texas on the land certificate, or in the United States on the land warrant, (*Hanrick* vs. *Barton*, 16 Wal., 170) In Mexican titles, the original grant or concession must be shown in

making out a title. It is indispensable, and will accordingly be found to be the first paper in all valid eleven league titles which have been before this court, as will be seen by the records in the cases. (*Hanrick* vs. *Barton*, 16 Wal., 170; *Hollingsworth* vs. *Flint*, 101 U. S., 591; *Spencer* vs. *Lapsley*, 20 How., 264; *McPhaul* vs. *Lapsley*, 20 Wal., 264, &c.)

It can not then be said to be irrelevant, because it is part of the title and conduces to prove an issue in the case, (1 Whart. Ev., Sec. 20), and all evidence which conduces or tends to prove such issue is relevant and admissible, and it is not necessary that it be sufficient. (*Schuchardt* vs. *Allens*, 1 Wal., 368.) The plaintiffs put in evidence themselves a copy of a copy of this paper in the Land Office, copy of the title, (Rec., p. 8), as an essential part of their title, and they certainly cannot be heard now to say that the original—the matrix of their copy—is irrelevant. The fact that we might have made out our title without it by using copies does not make the original irrelevant. Because to make testimony relevant, it is not necessary that it be essential. Though cumulative and supererogatory and unnecessary, it may be received in evidence. (3 Phil. Ev. C. H note, No. 307, p. 603, 3d Ed.) We chose to rely on the original, and not a copy, as we had a right to do. This paper, then, was certainly relevant, and this court will, of course, look to no other objections than those specially taken below, though others may be argued in plaintiff's brief.

2. The second objection interposed to the admission of this paper is "The paper, if genuine, is an archive of a foreign government and, from public policy cannot be introduced in our courts, but only a law-

fully certified and examined copy can be introduced." (Rec., p. 21.)

Here, again, plaintiff does not confine himself, in his brief and argument to the precise objection made below. He did not object below to the *manner* in which the archive was brought in. His objection was not that it was not brought in by its custodian, as might be inferred from his brief (p. 7). but the objection was that the original archive could not be brought in in any way, and to this the argument should be confined. None of the authorities cited by plaintiff say or intimate that an original archive is inadmissible simply because it is an archive, the substance of what they do say is that copies of judicial and other public records are admissible in evidence, because of the inconvenience and sometimes impossibility of producing the original, but none of them say that if an archive is actually produced in court it would not be admissible. The sections of 1 Whart. Ev., immediately preceding and following the one cited by plaintiff, show that the originals are admissible. It has been repeatedly held in Texas that archives are primary evidence, and, as such, admissible. (*Wheeler* v. *Moody*, 9 T. 375. *Horndan* v. *Casino*, 7 T. 322. *Blythe* v. *Houston*, 46 T. 67) and the reason why a copy of an archive made by its custodian is admissible is "because it (the archive) would have been admissible without proof of its execution" (*Andrews* v. *Marshall*, 26 T. 246).

Plaintiff calls the attention of the court, more than once, to the fee paid Willett for hunting up this paper, and we would not notice it but for the fact that he fails to show how much he paid for getting

the original protocol of the title out of the archives in Saltillo. We know that the fee paid Willett was, considering the services to be performed, not large; and we do not believe that any part of it was improperly used, or had improper influence.

3. The third objection to the admissibility of this paper is "that the custodian shows that he holds it by virtue of a foreign law, which is not properly proven," (Rec. 21) and we respectfully submit that this objection is not sufficiently specific for this court to consider it. The objection is that the foreign law under which the custodian holds the paper is not properly proven, but it does not point out what the particular objection to the proof is. The exception should be specific, and point out the particular objection. (*Noonan* vs. *Caledonia M. Co.*, 121 U. S., 400). But it was not necessary to prove the law under which the custodian held the paper. Jose M. Musquiz testifies that he was at one time a judge of the Supreme Court of his State, and is now Secretary of State, is the legal custodian of such papers, and is *de facto* in the custody and control of them, and that this is an original paper taken from these archives, &c. (Rec., p. 15.) Esteban Portillo testifies that the Secretary of State is the official custodian of such papers, and that he is in immediate charge of them under the Secretary of State as archiveist, and that this paper is an original paper found among these archives, (Rec., 15) and John Willitt testifies to substantially the same thing (Rec., 18).

And this was certainly competent testimony if not objected to and is all we need for our purposes.

Now this testimony was admitted without objec-

tion. And after it, and the other evidence on this point, was all in, the general objection is made that the foreign law under which it is held is not properly proven because, as shown for the first time by his brief, Musquiz says, incidentally, that by the laws of the State, and especially the law regulating the office passed February the 16, 1870, these records are in his custody and control. If it was thought that Musquiz and Partillo's testimony was not admissible because what they testify to ought to have been proved by a copy of the law the testimony ought to have been objected to on that ground at the time that it was offered.

But the objection would not be good if properly made. The paper itself shows that its original place of deposit was with the Secretary of State in Saltillo, Mexico, then called Leona Vicario, while Coahuila and Texas was one State and this Court takes judicial notice of the law at that time, (*State* vs. *Sais*, 47 T., 309; *Brownsville* vs. *Carazas*, 2 Woods, 93), and it is presumed to have continued the same until itis shown to have been changed. And when an officer is shown to be *de facto* in charge of a public office and performing its duties it is presumed that he is there *de jure* until the contrary is shown, and the law under which he holds need not be shown.

This same objection is made to the proof of the deed from Blanco to Laguerenne in substantially the same words and in the same manner, (Rec., 53), and the above answer applies equally well to it. In this case the notary Landgrave testifies that he is in legal custody of the records, and his testimony was not objected to when offered.

4. The fourth objection to the admissibility of this paper is that it is offered for the purpose of comparison of hands, and is not admissible for that purpose. This subject as well as the objections to the charges given and refused, relating to this subject, will be treated separately in the next part of our brief.

II.

The court below did not err in allowing the jury to use the signature of Miguel Rabago to the original petition for the purchase of the land as a standard of comparison to aid them in determining whether or not his signature to the letter power to Victor Blanco was genuine, nor did it err in giving and refusing charges on this subject.

This original petition bears date the 28th of November, 1828, and the concession endorsed on it Dec. 2, 1828 (Rec., p. 20), and was admitted in evidence as part of our title on the evidence above stated. The power from Miguel Robago to Victor Blanco. bears date June 8, 1832 (Rec., 35), and was admitted in evidence as an ancient instrument on the evidence detailed in the fourth bill of exception (Rec., p. 25), *et seq.*,) which is considered in part III. of this brief. The plaintiff offered evidence tending to show that Rabago's signature to this power was not genuine, and the court, by its charges, after all of the evidence, pro and con, was in, authorized the jury to use the signature to said original petition as a standard of comparison, under proper instructions, to aid them in determining whether the signature to the power was or was not Robago's.

The reason on which the old common law rule, forbidding proof of handwriting by comparison, was originally founded, was because the jury were supposed to be too illiterate to judge of this sort of evidence. (1 Glf., 576. Lawson's Exp. & Op. Ev., 330, 331.) This reason having long since ceased to exist, the rule ought to go with it. The country from which we inherited the rule has long since abandoned it, and it is gradually being abandoned by the States of this Union that once recognized it, until it is now recognized in only sixteen States, and in some of these it is very much qualified by exceptions (Lawson's Ex. & Op. Ev., 376–407). The judicial mind of the day is not satisfied with the rule, and so, too, recent text writers, and some old ones, are not satisfied with it, and do not regard it as supported by sound reason (1 Whart. Ev., 717 and Note. 1 Best Ev., p. 459. Lawson, 326, 2 Starkie (7 Am. Ed.) 516).

This court can scarcely be said to be committed to the rule. In one case it allowed a comparison to be made with a paper already in evidence (*Moore* v. *U. S.*, 91 U. S., 273). In another, the rule allowing proof by comparison when the instrument is ancient, was recognized, but the case did not require the decision of the question (*Strother* v. *Lucas*, 6 Pet. 767). And in still another not requiring the decision of the point, what is said in *Strother* v. *Lucas* is recognized as the law. This I understand to be the extent to which this court has gone on this question.

But we do not require an abandonment of the rule in order to sustain the action of the court below, because we come within several exceptions to the rule, as well established as the rule itself.

9 — Rogers v. Miller 12 Wal 326

Before going to these exceptions it may save time to answer the objections made by plaintiff under the first, second, and third subdivisions of his fourth objection, first exception, (Rec., p. 21,) and by the charge asked in his second exception, (Rec., p. 24), all to the effect that the signature of Rabago to said original petition could not be used for comparison, because it was not proved or admitted to be his signature, and there was no presumption that it was such. We respectfully submit that the signature of Rabago to said petition is fully proven as shown by the record. It purports on its face to have been signed by Rabago in person. (Rec., p. 19.) It is over thirty years old. In the original testimonio of the title made on January 11, 1834, there is an exact copy of it (Rec., p. 23), and Hannskin had this testimonio in his possession in 1837. (Rec., p. 29.) It was found in its proper place of deposit and is produced by its proper custodian, and he and other witnesses say it is the original (Rec., 14–19,) as detailed above (Part I). And before it was used for comparison it (being a part of the title,) was shown to have been so acted on, &c., as to make the proof of it as an ancient instrument perfect beyond cavil (Rec., p. 25 to 35,) as detailed hereafter. (Part III.) This amounts to full proof of the execution of this original as much so as if a witness had gone on the stand and sworn that he had seen it executed. An original land certificate, an archive of the General Land Office of Texas, was lately held to have been properly admitted as an ancient instrument on similar testimony. (*Shinn* vs. *Hicks*, 4 S. W. Rep., 486.)

Another objection urged by plaintiff in his argu-

ment in his brief, and on which he cites authority, may be answered here. It is that the comparison, if allowed at all, should have been made by an *expert*, and not by the jury. The answer to this, is that there was no objection made below to the manner in which the comparison was made. It was not then objected to because an expert was not used, and he cannot be heard to make the objection here for the first time, (Rec., p. 21 and 24), and there is no assignment of error to cover such objection if it had been made. (Plt'ffs Brief, p. 2.) The practice on this point, if it were necessary to go further, is different in the different States. (*Horner* vs. *Wallis*, 11 Mass., 309, 6 Am. Dic. 173.—Note), and the better reason is in favor of allowing the jury to compare. (*Travis* vs. *Brown*, 43 Pa. St. 9; 82 Am. D. 540.)

The exceptions to the general rule against comparison of hands, under which, we respectfully submit, that this comes, are the following:

1. This paper (the original petition) was already in evidence, admitted for another purpose, as shown above and hence comparison was admissible. (*Moore* vs. *U. S.*, *supra.*)

2. The plaintiff is estopped to deny the signature of Robago to this original petition, and hence comparison with it is admissible. A copy of a copy of this paper, as shown above, is the first paper in the copy of the title which plaintiff introduced in evidence in dereigning his title (Rec. p. 8) and he thus claims and dereigns his title through it. The copy purports to be taken from an original, signed by Robago in person, and it is offered as a copy of such original, so signed, as a part of his title. We produce

the original and show conclusively, as shown above, that it is such original, and he is estopped to deny that the signature is genuine, because he claims through it. This is an exception to the general rule against comparisons. (1 Glf. Ev., 581—*State* vs. *Clinton*, 67 Mo., 350—*State* vs. *Tompkins*, 71 Mo., 615 — *Kennedy* vs. *Upshaw*, 64 T., 420). The opinion of the court in *Moore* vs. *U. S.*, *supra*, shows that this exception was in the mind of the court when it rendered its decision. The claimant had introduced a power of attorney for another purpose, and the court held that it would be a fraud on the court for him to deny the signature to it, when the other party offered to use it for comparison. In other words, he was estopped to deny it.

3. This case comes also within another exception, thus stated by Mr. Best: "When a document is of such a date that it cannot reasonably be expected to find living persons acquainted with the handwriting of the supposed writer, either by having seen him write or by having held correspondence with him, the law, acting on the maxim *lex non cojit impossibillea*, allows other *ancient documents*, which have been proved to have been treated and regularly preserved as authentic to be compared with the disputed one." (Best Ev., Vol. 1, Sec. 240, p. 459.) And the same writer says that the age that the instrument has to be before such proof can be made is not settled and is uncertain. Id. Lawson states the rule to be the same as Mr. Best. (Law. Ex. & Op. Ev., 328), Greenleaf says that comparison is allowable in such cases, "when the writings are of such antiquity that living witnesses cannot be had and are yet not so old as to prove themselves. (1 G'lf.,

578.) Philips says that no period of antiquity has been fixed, but that "such evidence seems to be admissible whenever in the opinion of the judge, there is reasonable difficulty in procuring better proof in consequence of the remote period." (Phil. Ev., Vol. 2, p. 258—note; 3 Ed.) In *Canty* vs. *Platt*, 2 McCord, 261, it is said that the comparison is allowed when the writing is "so antiquated as to render it difficult, if not impossible, to produce a witness who has seen the person write," and in this case the signature of a Surveyor General who had been dead 40 years was thus proved. Abbott says that "at common law this comparison may be made with writings already in evidence, but not with others, except to prove an ancient instrument." (Abb't, 396). And expressions similar to the latter are found in a great many places. The English cases on this point will be found collected in 4 Jacobs, Fisher's Dig., p. 4953. From these authorities it would seem that it need not be impossible to find any living witnesses who ever saw the party write before comparison can be made, but that it is admissible when it appears to the court that there is reasonable difficulty in procuring better proof. The paper with which the comparison was made here, is of the class required in such cases. It has been treated and regularly preserved as an authentic document. (1 Glf. Ev., 578; 2 Phil. Ev., 257–8, note.) It is dated in 1828, and hence, is fifty-nine (59) years old, and the power to be proved up is dated in 1832, and hence, is fifty-five (55) years old, and they are both ancient instruments. (See Parts I. and III. for the proof.)

Miguel Robago died in 1848, which is forty (40) years ago. (Rec. p. 7) He and his family were

citizens of the Town of Santa Rosa, an obscure town in the interior of Mexico and lived there all of their lives. (Rec. p. 55) The plaintiff derives his title from a person who represents herself to be the widow of Robago, which, if true, prejudices whatever of the family still remains against defendants' title and increases their difficulty in getting better evidence than they have. We respectfully submit that after this lapse of time, and under these facts and circumstances, we come within the rule laid down in the above authorities. It would scarcely be possible after this lapse of time to get better evidence of the handwriting of an obscure man in an obscnre town in the interior of Mexico, a country on not very friendly terms with us.

Plaintiff further objects to this evidence, because the paper is not so old, but that living witnesses could be produced, and actually were produced. There is nothing in the first, second and third bills of exceptions, under which alone, this question was treated, showing that any such witnesses were introduced on the trial below. Some Mexican witnesses, including a woman who claimed to be the widow of Robago, and vendor of plaintiff, did testify on this point, on the stand at a trial had in the spring of 1880, before this paper was found, but neither of these bills show it, and nothing has been heard of their existence since.

4. This paper was admitted as a part of the defendant's title when offered, but it was not submitted to the jury for the purpose of aiding them in determining whether the signature to the power was genuine or not by comparison, until after the power had been proved up as an ancient instrument (Rec.,

25 to 35) and admitted, until after all of the evidence *pro* and *con* was in, in fact. Both sides had made out their cases and the evidence was conflicting. The rule against comparison does not apply and perhaps never did when a *prima facia* case has been made without it or when the evidence is conflicting. It is only when comparison is relied on alone and by itself. But when comparison is resorted to in *aid* and *corroboration* of other competent evidence or of doubtful original proof or when the evidence is conflicting, the rule is not violated. This seems to have been so at common law (2 Stark Ev. 516, Note, 7 Am. from 3 Landon, Ed; 4 Jacobs, Fisher's Dig., p. 4954; *Allsbrook* vs. *Roach*, 1 Espinassas, 351) And this rule is recognized and practiced as the true rule in a great many of the States where the common law rule as to comparison prevails. (*Bennedict* vs. *Flanegan*, (18 S. C., 506,) 44 Am. R., 583; *Bowman* vs. *Plunkett*, 2 McCord, 518; *Travis* vs. *Brown*, (43 Pa. St., 9), 82 Am. D., 540: *Baker* vs. *Harris*, (6 Whart., 284), 36 Am. D., 225; *Myers* vs. *Tascon*, 3 N. H., 48; *Gore* vs. *Stephens*, (1 Dana, 180,) 25 Am. R., 141; *Woodward* vs. *Spiller*, Id; *Smith* vs. *Fenner*, 1 Gallison, 175; *Moody* vs. *Randell*, 17 Peck., 490.)

Now it was in this way that the Court in its charge authorized the jury to use this paper. They were authorized to "use it as a standard of comparison to *aid* you in determining the genuineness of the signature to" the power. (Rec., p. 25.) This will be seen more clearly by referring to the full charge. The court had instructed the jury on the testimony tending to show that the power was an ancient instrument and genuine, and on the testimony tend-

ing to show that it was not genuine. and then told them that they could use this paper to aid them in their investigations. (Rec., p. 39 and 40.) We respectfully submit that this was correct under the law.

This *charge*, or this part of the courts charge, is objected to by plaintiff for several reasons, (Rec., p. 25,) and we respectfully submit that the assignment of error is not sufficiently specific for them to be considered. (Pl'ff's Brief, p. 2.) It does not point out in what the error in the charge consists or states why he objects to it. (Lucas v. Brooks 18 Wal 456). But we respectfully submit that there is nothing in the first two objections if it did point them out.

The authorities seem to be in conflict as to whether the judge or jury should pass upon the genuineness of the standard. In some States it is held as claimed by plaintiff that the Court must pass on this, while in others it is held that it must be submitted to the jury and that they must be instructed substantially as they were in this case (State v. Hastings, 53 N. H. 454—State v. Word 39 Vt. 225). But whatever the correct practice is, the plaintiff here is not injured and can not complain. If the court itself had passed on the question it must inevitably have found the paper genuine. The proof that it was genuine was overwhelming as shown by the record (p 15 to 18) and as detailed above under part I, and there was practically no opposing evidence as there shown and the court must have admitted the paper if it had passed on it, and the plaintiff is consequently not injured. This course really gave the plaintiff a chance which he was not entitled to, because there

was not enough evidence to sustain a verdict against the genuineness of the paper if that were the only issue before the jury, and hence the issue should not have been submitted to them.

The last objection made is fully considered above and needs no further answer.

III.

The letter power of attorney from Miguel Rabago to Victor Blanco, dated June 8th, 1832, was properly admitted in evidence as an ancient instrument and as a valid title paper in our chain of title. (*Rec.* 25)

We again respectfully submit that the assignment of error on this point is not sufficiently specific for this court to consider the objections urged by plaintiff under it. See fourth assignment (P'tiffs' Brief, p. 3).

1.

As stated before, this case was before the Supreme Court of Texas, on appeal from the District Court, and remanded, before it was transferred to the Circuit Court. (*Williams* vs. *Congor*, 49 T., 582, Rec. p. 8) This power was admitted in the District Court, and was before the Supreme Court in that case on the same evidence that it was admitted on in the Circuit Court, which is now before us here, except that it was strengthened a little. The same objections to its admissibility as an ancient instrument were then made that are now made, and the Supreme Court, in an elaborate opinion, by perhaps the best land lawyer that has ever been on that bench, held that the

power was properly admitted, and fully answers every objection now urged here. This being the case, we respectfully submit that the questions presented here by plaintiff on this point are *res judicata*. The law announced on this first appeal governs the case through all subsequent stages of its progress. (*Frankland* vs. *Cassaday*, 62 T., 418—*Meyers* vs. *Dittmar*, 47 T., 375—*Clark* vs. *Keith*, 106 U. S., 464) In a case like this the Circuit Court takes the case precisely as it stood in the State Court at the time the petition to remove was filed. (*Duncan* vs. *Gegan*, 101, U. S., 812)

That the evidence showing that this letter power from Rabago to Blanco is admissible as an ancient instrument is the same in this case as it was in the Supreme Court of Texas, if not stronger, is fully shown by the record.

1. The letter power is dated June 8, 1832, is an old looking paper, in sound condition, not mutilated in any way and containing no erasures or interlineations, and purports on its face to be signed by Miguel Rabago, (Rec. 26–28). It, in terms, says it hands Victor Blanco the testimonio of the eleven leagues (meaning the concession or permit.)

2. It was found in Galveston in an old trunk belonging to Samuel May Williams, in the possession of his son, Judge W. H. Williams, who says the trunk contained old papers, has been in the possession of the family since his earliest recollection, and who had search made for the paper at the instance of Col. Thomas M. Jack, acting for Gen. Thos. Harrison, attorney for the defendants. (Rec. 25, 26.)

3. Samuel May Williams came to Texas in 1821 or 1822, was Secretary of Austins' Colony, lived at one time at San Philipe De Austin, and died in 1858. (Rec. 25, 26.)

4. This paper has endorsed on it a memorandum of its nature and contents in the hand-writing of Williams. (Rec. 26.)

5. It also has an endorsement on it dated April 3, 1833, by Blanco, substituting said Williams, to the extent that he might get possession only (Rec 36); and in the trunk were found other old letters and documents signed by Blanco. (Rec. 27.)

6. Victor Blanco's signature to this indorsement certainly, and perhaps the whole indorsement, is in his genuine handwriting. (Rec., 29.)

7. Blanco was, at ~~that~~ ane time, Governor of Coahuila and Texas, at another, a Senator in the Congress of Mexico, an honorable man, (Rec., 30) and was the uncle, by marriage, of Rabago, and on friendly terms with him. (Rec,, 34.)

8. On December 3d, 1833, said Williams, as agent for Rabago, made application for possession of the land, title, &c., and the title was extended and possession given on this application. (Rec., 8, 12, 34.)

9. The deed, or act of sale, from Rabago by Blanco to Laguerinne, dated May 25, '36, recites that the sale was made under a letter power, and that it was returned to Blanco. (Rec., p. 35.)

10. When Geo. L. Hanneken purchased from Prioland, agent of Laguerinne, in 1837, he received from him the following title papers:

1. The original testimonio of title to Rabago.

2. An official certified copy of a power of attorney from Rabago to Blanco.

3. The original act of sale from Rabago by Blanco to Laguerinne.

4. The power of attorney from Laguerinne to Prioland.

5. And the deed to himself. (Rec., p. 29. 33.)

11. These papers, except the first, were given by Hameken to his agent Rose in 1850, and he has not seen them since, but he kept a copy of this copy of the power to Blanco, and he produces it in evidence, and it is an exact copy or counter-part of the power found in William's trunk, except that two abbreviations in the latter are written in full in the former. (Rec., p. 28, 29, 34.)

12. When Hannekin bought, the purchase money due from Rabago to the State of Coahuila and Texas for the land had not been paid, and Hannekin paid it in 1838 and 1839, (Rec., 27,) and paid the al cobala (or tax) on the sale to Laguerinne, and produced the treasurer's receipt for it. (Rec., 33.)

13. The defendants had in their possession and put in evidence this original testimonio of the title. (Rec., 35.)

14. Hannekin, immediately after his purchase, put the land in the hands of his agent in Texas—Rose—who visited the land, and from that time, say in 1838 and on, he and his vendees claimed the land under this title, and through this power exercised every act of ownership that an owner ordinarily does or can over such land, paying taxes, putting parties in pos-

session as soon as the country began to settle up, say in 1850, bringing suits against squatters, cutting up by surveying over it, settling it, putting in cultivation, &c., &c., all as detailed from the bottom of page 29 to the bottom of page 34 of the record.

This is a mere synopsis of the evidence on the admissibility of this power, and the record will show that it is fuller in this case than it was when the case was before the Supreme Court.

That the evidence was amply sufficient, if the Court will consider this question at all, I have only to refer to the opinion of Justice Moore, in the Supreme Court case (*Williams* vs. *Conger*, 49 T., 594). He thought that it was not only sufficient, but if that was the question before them, he thought that they "could hardly hesitate to say that" it was "not fully sufficient to warrant the jury in finding that" it "conclusively proved its (the power's) due execution as a question of fact, after it was admitted," notwithstanding the testimony of the Mexican women (599), and he was inclined to affirm the case, notwithstanding the error in the charge. All of the objections urged by plaintiff to the admissibility of this paper as an ancient instrument, are answered fully by Justice Moore's opinion, and needs no further attention, but there are a few other objections which, perhaps, should not be passed in silence.

2.

1. It is objected, in substance, in three propositions, that this power is a mere private paper, not executed with any of the formalities of authentic

acts, and hence invalid and not admissible in evidence in this case (Rec., 32).

We respectfully submit that there is nothing in this objection. The only difference between Mexican instruments, executed with and without the formalities required by the Mexican laws, was in their probative value. The former made full proof of themselves without proof of their execution or any outside proof, while the execution of the latter had to be proved, as at common law. This is shown by the first case cited by plaintiff, as well as by other cases. (*Andrews* vs. *Marshall*, 26 T., 212.) We proved the letter power as at common law, which was all that could be required of us. Letter powers have frequently appeared in titles before our courts, which have been held valid. (*Watrous* vs. *McGrew*, 16 T., 509.)

2. There are several other objections made to this paper which hardly merit further notice, but as they and plaintiff's argument on them are apparently based on a misunderstanding of the record, perhaps it would be well to point this out.

One is that the substitution of Williams by Banco, by endorsement on the power, (Rec., 36,) transferred all of his powers to Williams and left nothing in Blanco. This is a clear mistake of the record. The power expressly gives Blanco power to get possession himself or by an agent, but gives him alone power to sell; and he does not pretend to transfer to Williams more than the power to get possession, which, of course, includes getting out final title, because placing in possession was the final act in completing the title. (Rec., p. 36.)

Plaintiff's statement, under these objections, is also based on a misunderstanding of the record. The record does not bear him out in the statement that the papers in the old trunk were absolutely of no value, or that it absolutely remained there for forty-three years without any one knowing where it was. The evidence is that the papers in the trunk were old miscellaneous papers, relating to occurrances before the year 1836, as near as one witness could recollect; some being in English, some in Spanish, and probably some in French (Rec., 25 and 26). According to the other witness, the trunk contained letters and documents, some in English and some in Spanish; some related to the private business of Williams; some were letters written to him concerning lands in Texas, many of them being historical and related to public affairs, and among them "several letters and documents signed by Victor Blanco. (Rec., 26). If the papers were put there during the "run-away scrape," as supposed, by Judge Williams, they were perhaps not well assorted. (Rec., 26.) As to the other point Judge W. H. Williams does not pretend to say when the letter power was placed in the trunk or how long it remained there unknown to anybody. According to his testimony, he was only three years old at the time of the runaway scrape, and his father died in 1858, when he took possession of the trunk, and that it has always, since he can recollect, contained these old papers. (Rec., 25 and 26.) The presumption is that this old paper was put there by Williams prior to his death in '58, and probably long before his death; but the record does not say when. This is all conjecture. It was certainly used by Williams in getting out the final

title, because he could not get out the title without a power. He may have returned it to Blanco, and the latter may have sent it back to him, for some reason, after the sale to Laguerinne. The record is silent as to all these matters.

I might not have noticed this, because the Supreme Court of the State has decided that the paper was found in a proper place, but this misunderstanding of the record on this point appears so frequently in plaintiff's brief that I could not pass it by in entire silence.

IV.

The Court did not err in charging the jury that Blanco could have procured and retained a legal copy of the power from Rabago to him, which would have all the force and effect of an original, nor in refusing the charges asked by plaintiff on this subject, as shown under the fifth assignment.

The extract from the Court's charge, found in the assignments of error and in the plaintiff's brief, is not full enough to show the Court's charge on the subject, and will be misleading if taken alone.

Plaintiff objected to the admission in evidence of the power found in Williams' trunk, because they said that as the deed from Blanco to Laguerinne recites that the power of attorney, by virtue of which it was executed, was before the officer at the time it was executed on May 25, 1836, in the city of Mexico, the one found in the trunk could not be the same one because, as they insist, it was then in the trunk in Texas, and this objection was urged before the jury. (Rec., 36)

In order to keep the jury from being misled by this objection, the Court, after instructing the jury fully as to how they should proceed in determining whether the letter power found in the trunk was genuine or not, instructed them, in effect, that Blanco, under the law then existing, might have retained in his possession a legal copy of the power of attorney sent to Williams, which would have all the force and effect of the original; and though the original might at the time be in the trunk in Texas, Blanco's conveyance would not, on that account, be without authority if the power found in the trunk was in fact a genuine paper. (Rec. 41.)

This same objection was before the Supreme Court of Texas when the case was there, and the court decided that Blanco could have retained such copy if he desired, even without the concurrence of Rabago (*Williams* vs. *Congor*, 49 T., 595 & 597), and this charge is substantially what the Court decided, and the question is *res judicata*. It will be found to be good law, too; and plaintiff has not, and cannot, cite any authority to the contrary.

It will be found, on examination of the full charge of the court, that the charge asked by the plaintiff and refused, was unnecessary and was improper in the terms asked, without further qualification, and would have tended to mislead the jury. The court's charge fully covered the points in the charge refused, and had submitted the whole question fairly to the jury, and giving the charges asked for would have been error.

Plaintiff states, in his statement and argument, that the record shows positively that the original power under which Blanco sold to Laguerinne was

before the officer when the act of sale was executed, but that it is not at all sure. The recitation in the act of sale does not call it an original power. The word original does appear in the certificate to the Hannekin copy, but it is not sure that the officer meant to say that the paper was the first and only original power from Robago to Blanco. He may have meant that the copy was a true copy of the original paper that Blanco had presented to him, and not that the paper was an original paper.. Rut this is of little consequence, because, as the Supreme Court says, he either kept a duplicate original or got an official or legal copy of the original (p. 595). We at this day might, and probably would, in fer from the language used in the certificate to the Hamekin copy that the original paper was meant, but such copy would properly be called an original at that day, because it had all the force and effect of an original. The word original had a different meaning when applied to papers in Mexico then and now from what it now has with us. The testimonio (officially certified copy) of an instrument, had then all the force and effect that an original has with us, and was called and spoken of as an *original*, but was generally called a second original. (*Titus* vs. *Kimbro*, 8 Tex., 212; *Blythe* vs. *Houston*, 46 T., 67; *McPhaul* vs. *Lapsley*, 20 Wal., 284.) The language used in the act of sale and in the certificate to the Hannekin copy, when speaking of the power, would be understood in Mexico to apply to such a copy at that day, and so it would now.

Plaintiff also says that a number of living witnesses swore that the signature to the power found in the trunk was not Rabago's. This has nothing

to do with the question now before us, and perhaps I ought not to notice it, and I would not had plaintiff explained why they did not also swear that the signature of Rabago to the original petition for the purchase found in the archives at Saltillo was not genuine and why plaintiff did not want the signature to that paper compared with the signature to this. This paper was on file over two years before the trial.

V.

The court did not err in giving to the jury that part of its general charge set out in plaintiff's sixth exception, relating to proof of the power.

As we said about other fragmentary parts of the court's charge, complained of, the whole charge, if looked to, will be seen to have presented the whole case fairly to the jury, and that the objection to this part of the charge is not well founded. (Rec. 38)

On the point on which the charge complained of was given, the testimony was all one way, and there was no opposing testimony. The Supreme Court of the State had decided that this testimony was not only sufficient to authorize the admission of the paper as an ancient instrument, but that if this were the question before them they could hardly hesitate to say that it was not fully sufficient to warrant the jury in finding that it conclusively proved its due execution as a question of fact, after it wes admitted. (*Williams* vs. *Conger*, 49 T., 599) This being so, the Circuit Court might have told the jury that the fact was proven, because if this was the only question before them, and they had returned a verdict the other way

the court would have been bound to set it aside. The plaintiff in his brief substantially admits that there is nothing in his objection. In the opening of his argument, he says: "There is no contention on the part of the plaintiff that the defendants' vendors went on the land about 1850, and did all the acts necessary to establish an ancient instrument." * * * "The plaintiff admitted most of the facts and denied their sufficency," &c. When the facts are admitted, their sufficency is a question of law for the court.

This was a mere summing up of the evidence on this point to the jury, which is not objectionable, and the whole charge will show it. There is nothing in the cases cited by plaintiff which needs answer.

VI.

The Court did not err in admitting to the jury the "Hannekin copy," nor in refusing to give to the jury the charge asked by plaintiff on this point.

This Hannekin copy was introduced by defendants in connection with and along with their other evidence, to prove up the power found in Williams' trunk as an ancient instrument. (Rec., 27.)

It was offered merely as a fact showing that as early as 1838, Hannekin, who then owned the land, had this copy in his possession, and not as a muniment of title. (Rec., 43.)

This copy, as shown before, was gotten on his demand for it, and was an exact copy of the power we offered in evidence, except two abbreviations in the latter were written in full in the copy. (Rec., 34.)

This tended strongly to show that our power, which purports to be an original signed by Robago himself, was as old as 1838, and was hence admissible.

There was no chance for the jury to misunderstand how this was offered, and hence no necessity for the change asked by plaintiff. (Rec., 43.)

VII.

The court did not err in admitting in evidence the copy of Blanco's deed to Laguerinne nor the copy of Laguerinne's power to Prioland.

This certified copy of the power to Prioland, in precisely the shape that it appears here (Rec., p. 51 and 52), was admitted in evidence in the State court, over the same objections urged here; and the Supreme Court held that it was properly admitted, and this question is *res judicata*. (*Williams* vs. *Conger*, 49 Tex., p. 600.)

No objection was made to the copy of Blanco's deed to Laguerinne in the State Court, but, on examination, it will be found that this copy is certified in precisely the same way that the Prioland power is, except that in the latter a copy of the judicial order directing the notary to make the copy is inserted, and in the former, the order is merely recited. (Rec., 49.) Besides these certificates, the notary Landgrave who issued this copy, testifies that he is in official custody of the protocol of this deed, that the signature of the notary, Bonilla, before whom it was executed, to the protocol in his possession, is genuine; and he, in a quaint way, proves the copy up as an examined copy. (Rec., 45.) Hamekin also testifies

that the original testimonio of the deed was delivered to him when he purchased; that it has been lost and search has been made for it; that he is acquainted withthe hand writing of Bonilla, and that his signature to the original testimonio was genuine. (Rec., 46.) This being executed before a notary without assisting witnesses, as was always done at that time, proof of his signature alone is sufficient. Had the instrument been executed before an officer who could only act with assistance, as a judge or alcalde, then the signatures of the assisting witness would also have to be proven. (*DeLeon* vs. *White*, 9 T., 600; *Spencer* vs. *Lapsley*, 20 How., 274.

This deed to Laguerinne is also proved up as an ancient instrument. All of the evidence introduced in connection with the power is applicable to this also, and copies may be so proved up. (*Holmes* vs. *Coryell*, 58 Tex., 681). But the certified copies are sufficient. (*Williams* vs. *Conger*, 49 Texas; *The State* vs. *Cardinas*, 47 T., 290; *Las Cayagas* vs. *Larionda*, 4 Martin, 283 La.; *Watrous* vs. *McGrew*, 16 Tex., 572.)

Objection is made to this deed that Rabago's name is not signed to it, but that Blanco executed it in his own name. The deed recites that Blanco is acting as attorney, and this form of conveyance was good at that day in Texas. (*Hanrick* vs. *Barton*, 16 Wal., 173 and 174.)

This deed put the title out of Rabago, and there was nothing left to descend to the widow.

VIII.

The court did not err in refusing to give to the jury the charges asked by plaintiff on the question of the alienage of Laguerinne at the date of the deed to him.

Plaintiff, in his brief, admits that the law on the point here made is fully settled against him by this court, and this question needs no reply from us. I may say, however, that the question is really not raised by the evidence in the record. The *citizenship* of Laguerinne is not established by the record. Hamekin does not know whether he ever lived in Texas or not, and does not even know where he was born, or what his nationality was. (Rec. 54.)

IX.

If the trunk power which we produce is not the original, which we claim it to be, the evidence in the record is much more than sufficient to justify the conclusive presumption that one did exist, and the proper result has been reached by the judgment below.

The plaintiff insists, throughout his brief, that all of the acts of ownership, possession, &c. which we show for the purpose of proving up the power, which we offer, as an ancient instrument, were not done under, and are not referrable to the power we offer at all, but to another entirely different one of which the Hamekin copy is a copy, and that the Hamekin copy is not a copy of ours. The fact that the Hamekin copy is an *exact* copy of our power, and that ours is apparently an original, and that it was necessary for

Williams to have this in order to do what he did in getting the title and possession of the land, and that it has Blanco's endorsement on it in his own handwriting, transferring part of his power to Williams —just as he would do on an original—shows that there is nothing in this position of plaintiff. But admitting, for the sake of the argument, that plaintiff is correct, yet we say that the facts connected with the procurement of this Hamekin copy, and all the acts which plaintiff says was done under it, and the fact that it is recited in the deed to Laguerinne, point to the irresistible conclusion that there was an original power from Rabago to Blanco, though ours may not be the one, and such original will, from these facts, now be conclusively presumed. (*Williams* vs. *Conger*, 49 T., 600; *Watrous* vs. *McGrew*, 16 T., 512; *Johnson* vs. *Timmons*, 50 T., 534.) *Johnson* vs. *Timmons* says that a power will be presumed in most cases when the deed made under it would be admitted as an ancient instrument, and *Williams* vs. *Conger* says, that the facts here are amply sufficient to justify the presumption of a power.

This being so, on his own theory, no useful end can be accomplished by reversing the case for the supposed errors in the admission of evidence as to this power or in the charge of the Court in reference thereto.

On the whole, we respectfully submit, as in substance said by Justice Moore, that the want of title in plaintiff is so manifest from the entire record, and the justness of defendant's title so evident, and it is so plainly manifest that the correct result has been reached by the verdict and judgment below, that

the judgment ought not to be reversed on the technicalities complained of by plaintiff, even though the Court should think that there was anything in any of them. We have been harrassed now for fourteen long years with this claim, which ought to have been abandoned by plaintiff when the decision was rendered by the Supreme Court of Texas in 1878.

E. H. GRAHAM,
Attorney for Defendants in Error.

125-397

Office Supreme Court U. S.
FILED
DEC 16 1887
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

D. H. WILLIAMS
vs.
E. D. CONGER *et al.* } No. 105.

Supplemental Brief for Defendants in Error.

We desire to state succinctly, and a little more plainly, parts of the position we seek to maintain with reference to the question of comparison of hands discussed in part II. of our brief, and with reference to the question of alienage discussed in part VIII. of our brief.

II.

This relates to the admissibility of the original petition of Rabago, found in the archives in Saltillo, for the purpose of comparison of hands and the charge of the court thereon.

All of the objections made below to the use of this paper for the purpose of comparison are the following:

When the paper was originally offered in evidence it was objected to because—

1. It is not such paper as was required to be signed by Rabago, and no presumption can arise that it was so signed by reason of its being an archive or ancient document.

2. There is no evidence of the handwriting being that of Rabago.

3. It is not admitted nor proven to be the genuine handwriting of Rabago.

4. The instrument with which it is to be compared is not so old but that living witnesses to the questioned signature can be and are actually produced. (Rec. 21.)

A counter charge was asked by plaintiff to the effect that because at the date of said petition the law did not require the same to be signed by Rabago, the jury could not use the signature of Rabago to it for the purposes of comparison. (Rec. 24.)

The exception taken by plaintiff on this point to the charge given by the court is, that it submits to the jury a paper for comparison of handwriting which is neither proven nor admitted to be genuine, nor to be signed by the genuine signature of Miguel Rabago. (Rec. 25.)

These are all of the objections made, and it will be seen, that not one of them makes the general objection that the signature of Rabago to the power can not be proved by camparison of handwriting, because that mode of proof is not lawful. The most of these objections in effect, admit that this mode of

proof is proper, but say that the original petition is not a good standard, because the signature of Rabago to it is neither admitted nor proved to be genuine, and we respectfully submit that our investigations here must be confined to the specific objections made on the trial below and can not extend to the general question as to whether or not handwriting can be proved by comparison (20, Wal, 125—133. 102 U. S., 586; 104 U. S., 786). The counter charge asked can not properly be treated as an objection because improper in the terms asked and properly refused.

That the objection that the signature is not properly shown to be Rabago's is not well taken, is shown in our main brief (p. 17).

But if this court does not consider the above position tenable then, our main brief (p. 18, 22) shows that we came within several exceptions to the rule against comparison.

VIII.

We desire to say in addition to what we said in our main brief on the question of alienage (p. 38), that the question raised by plaintiff, as is in effect admitted by him, is fully settled against him, both by the Supreme Court of Texas and by this court, (*Barrett* vs. *Kelly*, 31 Tex., 481; *Andrews* vs. *Spear*, 48 T., 568; *Phillips* vs. *Moore*, 100 U. S., 208; *Osterman* vs. *Baldwin*, 6 Wal., 116), and it has now become a rule of property which this court will not disturb.

Besides this, the Republic of Texas, by act of Dec. 24, '38, (Pas. Dig. Laws, 4106), provided, that persons who were indebted on these old matters

might pay their debts to the president of the board of land commissioners in which the land was situated—then called a receiver—or to the secretary of the treasury. When Hammekin bought, the original purchase money due from Rabago on his purchase had not been paid, and Hammekin paid it in '38 and '39. (Rec. p. 27.) This virtually amounted to a ratification by the Republic of the title in Hammekin and waived the forfeiture contended for by plaintiff.

But we respectfully submit that there is nothing in this objection to our title.

E. H. GRAHAM,
Att'y for Defendants.

125-394

Office Supreme Court U. S.
FILED.
DEC 16 1887
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

DECEMBER, 1887.

D. H. WILLIAMS

vs.

E. D. CONGER *et als.*

No. 105.

PHILADELPHIA BAR ASSOCIATION

ON ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT WACO.

Argument of Plaintiff in Error by way of Answer to Defendant's Brief.

EUGENE WILLIAMS,
Of Counsel for Plaintiff in Error.

R. O. POLKINHORN, PRINTER.

In the Supreme Court of the United States.

DECEMBER, 1887.

D. H. WILLIAMS
vs.
E. D. CONGER *et als.*
No. 105.

ON ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT WACO.

Argument of Plaintiff in Error by way of Answer to Defendant's Brief.

May it please your Honors:

With respect, I presume the record has been carefully read, as well as briefs filed by both parties. No further statement of the case is necessary.

Many errors appear in the record, and are specifically pointed out with painstaking care in the plaintiff's brief, and will be clearly understood, notwithstanding, in a general way, defendant's counsel has suggested an insufficient assignment of particular errors. In this behalf, the plaintiff has erred, if at all, in detailing too minutely his wrongs in his bills

of exception, rather than in placing reliance upon the discriminative judgment of this Court.

Of the errors heretofore argued in the briefs, only four will be considered. These are selected, not because more grievous, but because a favorable opinion will bear more weightily in the plaintiff's scale hereafter.

Mention of these will not be construed as abandonment of others, which have heretofore been discussed, and could not be more fully impressed by taxing further your patience.

Defendant's counsel offers a gratuitous conclusion on page 5 of his brief, in selecting the errors upon which he thinks the plaintiff seriously relies.

First.

In answer to defendant's first and second propositions stated on p. 5 and 11 of his brief.

The defendant confounds the application for land made by Rabago with the concession granting the privilege to buy made by Viesca, the Governor of Coahuila, y Texas.

The plaintiff will concede, if desired, that the concession is an absolute requisite to a valid grant. This he is not called upon to deny, and is willing that your Honors hold it to be true. If, however, his rights depended on the proposition, he would not be lacking authority to throw grave doubt upon it. Yet this is not *the error* complained of on p. 28 of the record and p. 5 of his brief. It is true the concession is mentioned, but of it he makes no complaint, as it is not offered as constituting a standard for comparison of hands.

The plaintiff prays this Court not to be led astray by misdirection. He has suffered so grievously by thoughtless judgments that he asks a critical analysis of the record.

Defendant's counsel, on p. 10 of his brief, says: "The original grant or *concession* must be shown in making out a title. It is indispensable, and will accordingly be found to be the first paper in all valid eleven league titles," &c. This the plaintiff may confess, and yet reply that here the *application* is also urgently objected to.

No case can be found where it has been held that *an application* is indispensable to such a grant. It is the application and not the concession to which plaintiff urges objection.

Nor does the plaintiff object to the application, if it be withheld as a standard of comparison. It cannot harm the plaintiff—it fails of service to his opponents. He has objected to it on the ground of its irrelevancy, and the objection is well taken, for it does the plaintiff's title no hurt—it proves nothing.

In his brief the plaintiff could only surmise the ground upon which the defendant hoped to support this application as a standard of comparison. The task was difficult, and the defendants' brief has barely enlightened the record. We find in it no single aim, true to the mark, bringing objection home to judgment; but among various statements, a well settled rule of law is challenged, and its every exception is conscripted into arms to do service beneath the banner of this error.

The application is inadmissible as evidence but, as said, the plaintiff merely reiterates his objections and

now turns to answer the grounds upon which the defendants claim it competent as a standard.

The defendant treats any ancient instrument in evidence as a competent standard; citing *Hicks* vs. *Shinn*, 4 S. W. Rep., 486. That case only holds the bounty warrant of George Lemoyne properly proven as ancient, and says nothing of its competency as a standard for comparison of hands; and as to its relevancy, that as Uri Holbrook claimed through the warrant by purchase from Tomkins against the patentee Lemoyne, the same for that reason was properly in evidence. And note—this was the warrant, not the application for the warrant.

But the defendants' brief has so many statements aimed at, but falling short of the record, I will refrain from at once answering them, trying to do so as they are reached later, and at once go to his exceptions under the general rule of law not allowing comparison of hands.

I. (Defts' brief, p. 18.) Can counsel intend what is contained in this paragraph to be a full statement of this exception?

It is accurately stated in plaintiff's brief, page 13: Comparison is allowed where other writings (1) *admitted or clearly proven to be the genuine handwriting* of the party (2) are already in evidence (3) for some other purpose; (4) but if not admitted or clearly proven to be such genuine handwriting, (5) or if in evidence, but not for some other purpose, comparison is not allowed.

(See authorities in plff's brief, p. 13, *et seq.*

The plaintiff contends this paper has been injected into the case, not for some other purpose, but for the

sole and single purpose of using it as a standard. Do your honors have a vanishing doubt of this? The defendants say, "we chose to rely on the original and not a copy, as we had a right to do;" but in clearly narrating the methods of issuing titles to grantees, their counsel tells of how a copy of this pretended paper was stitched to the other papers in the form of a book, and that this book was kept in the archives, and only a copy of it was "*delivered to the purchaser as evidence of his title.*" (Deft's brief, bot. p. 6.) The law fixed the copy as evidence of title, and the defendants offered such a copy of the entire title, and they have no right to *choose* to rely on the original when they say the law fixed the copy as such in order to double the promontory on which the rule excluding comparison of hands stands sentinel, guarding against collateral issues such as the one now distressing this record.

But the plaintiff cites the Court to *Pierce* vs. *Wallace*, 18 Cal., 166, where it is expressly held that the petition (application) need not be proven. "We think the court erred in rejecting proof of the grant. It was not necessary to its validity that proof should be made of the petition. The grant, if properly issued, is the effective paper," and to *Reynolds* vs. *West*, 1 Cal., 328, where it is held it need not be signed. "The want of her (grantee) signature does not affect the validity of the subsequent grant," and to *White* vs. *Holliday*, 11 Texas, 607, where an attorney with verbal authority signed the application in his own name, and the grant was sustained.

The application proves nothing, and the plaintiff cares nothing for its contents, and when the defendants counsel tells so clearly that a copy of it is

fixed by the law as primary evidence of its contents, we need not look to the California and Texas reports for grounds excluding it as a standard, because not in evidence *for some other purpose.*

That the paper is not honestly in evidence for some other purpose, is shown by *Hazleton* vs. *Union Bank*, 32 Wis. 48. There the same effort was made as here *to choose* into the record an irrelevant paper. The court said: "It is argued that a writing offered should have been received in evidence as tending to prove that when the same was executed Buchannon owned the Hargrave notes and mortgage. It is not disputed that Buchannon owned the Hargrave notes and mortgage when the same were executed, hence the writing was irrelevant. *This issue being admitted, the writing could not be used as a standard of comparison.*" No conviction could be clearer than that the application can add nothing to the admission by both parties that Rabago once owned the land (Rec., p. 49).

Each party pressed this upon the other. The record is redolent of the perfume exhaled by the honesty and clearness of Rabago's title. That he owned the land the plaintiff proved by a duly certified copy of the book which had been stitched together, as counsel graphically describes, and the defendant set it at rest by his copy of the book which he says the law fixed as conclusive evidence of Rabago's title. Nothing was omitted. Each party proved and admitted title in Rabago. Two copies of this application were in evidence, a copy attached to the book and one to its copy, introduced by plaintiff and the defendant, and yet learned counsel will trifle with words by say-

ing this paper was introduced for some purpose other than as a standard.

If not in evidence for some other honest purpose it is excluded from the first exception as stated by defendants, still if not excluded, the authorities are without exception, in saying the jury "cannot make comparison with a signature not admitted or established; or where the result *might* be to raise *a collateral issue* as to the genuineness of such other signature." (Sheldon G. Kellogg, in 12 Central Law Journal, 507.)

Here, again, the plaintiff may admit the application sufficiently proven as an ancient instrument to establish it before the jury to prove its contents, but to say that *the handwriting is proven or admitted* is to falsify the record. Counsel did not distinguish between the genuineness of the contents of the instrument and proof of the writing of Rabago. He does not contend, nor does the court below in his charge (Rec., p. 51,) that the entire application was written by Rabago. Yet the same evidence which would establish the signature would establish the the body of the paper.

The plaintiff fails to see how under this exception the application has been proven, referring to authorities cited in his brief, p. 13. His witness Flores, (Rec., p. 29), *did* look for this paper and failed to find it in the office where it should have been. No better evidence could in the nature of things be offered.

The question is asked why the living witnesses did not testify to the falsity of this paper. (Def't Br., p. 21.) The record shows they were not present at the trial. Their written evidence taken at a former trial

was read on this. But of what avail to retake their depositions to be read before jurors as to this signature, when their positive denial of the main signature was not believed, and when counsel in a brief before this Honorable Court goes beyond the record to thrust his gibe at the "woman who claimed to be the widow of Rabago." The main signature was proven a forgery by "a number of living witnesses." It is fair to presume the signature to the application by reason of its similarity, would also have been so proven, if the witnesses had been present; but if the evidence availed nothing as to the first, it would have been worse than folly to have expended fees in taking their deposition to the falsity of the second, which was looked up after their evidence had been first taken.

As to the first signature, if the power be properly in evidence as ancient, the burden shifts to the plaintiff to disprove it; as to the second, when offered as a standard, the burden is on him who offers it to so select his standard as to avoid a collateral issue, and if this be raised the standard is discarded. (See numerous cases plaintiff's br., p. 13 *et seq.*)

2. (Defts. br., p. 18.) The defendant's counsel cites several authorities pointing to the doctrine of estoppel. Greenleaf states, by way of example, that such may be the case, but he lays down no rule. *Kennedy* vs. *Upshaw*, 64 Texas, 420, held that where a paper had been admitted to bear a genuine signature *in open court*, the same person so admitting, would not be heard to deny it because of the fraud, such a practice would work on the court. The same proposition is stated in nearly these exact words in *Moore* vs. *U. S.*, 91 U. S., 270, but nowhere after ex-

haustive search has been found a single expression to the effect that if the defendants pretend this to be the original application or even prove its contents to be the initial paper in the grant, the plaintiff must be estopped to deny that the hand of Rabago traced the characters which it contains, and that too, when by strong intimation, the record shows the trial court did not consider all the paper in Rabago's hand. And if not all, then what part may the plaintiff deny, and as to what part is he estopped from denying that Rabago actually held the pen as it wrote the words?

The doctrine of estoppel as such does not apply here. It will often cloes one's mouth and not hear his denial, that a paper bears certain contents but—that the contents are written in red or blue ink, in Spencerian, angular or Rabago's hand, the law would not be guilty of the folly of estopping him to deny.

The authorities are too numerous for argument—(See plaintiff's, brief p. 13.)

Bragg vs. *Colwell*, 19 Ohio St., 412;
Shannon vs. *Fox*, 1 C. Ct., 133;
Martin vs. *Maguire*, 7 Gray, 177:
Jones vs. *State*, 60 Ind., 141;
Lawson Ex, Ev., p. 382;
Alport vs. *Meek*, 4 C and P., 267;
Goodyear vs. *Vosburg*, 63 Barber, 154.

In *Bragg* vs. *Colwell*, *supra*, Bragg "had admitted and recognized his signature," it seems, "as valid and binding on him * * but denied that the handwriting was his," and it was held no estoppel.

In *Martin* vs. *Maguire*, *supra*, it is held that "by reading to the jury a mortgage the plaintiff did not

render it admissible as a standard to be used by the defendant"—no estoppel.

In *Jones* vs. *State*, *supra*, a witness testified the prisoner had admitted to him he had written "two papers." It seems this was out of court, but was not estopped to deny the handwriting, and they were held not proven.

In Lawson's Ex. Ev., p. 382, the acknowledgment before a notary is not an estoppel or sufficient proof of the standard.

In *Alport* vs. *Meek*, *supra*, "the drawer's name was admitted by the acceptance," but there was no estoppel or sufficient proof of the standard.

In *Goodyear* vs. *Vosburg*, *supra*, "the signature of a witness to an assignment in evidence by the plaintiff, was held not so proven as to allow the defendant to use it as a standard," and there was no estoppel.

How much less when the plaintiff had never heard of this application until it was needed by the defendants, nor had he heard of the old trunk power until after this cause had been three years filed, and the defendants needed other evidence.

Defendants do not pretend that either of these papers are entirely written by Rabago; yet, as on their face, they purport to have been written by him the evidence proves they are entirely so written, or falls short of estopping a denial of the hand.

Were the authorities otherwise, no estoppel is shown here. The plaintiff has never, nor has Robago or his wife, according to the record, admitted, claimed or acted under this paper. The record is silent as to any act of theirs touching this paper, except denial.

A pretended old paper, found by a well-paid em-

ployee, is thrust upon the plaintiff, given to him and forced upon him, while he resists and denounces it as a fraud. Introduced into the records since a time when an honest search had shown it was not among the archives, the plaintiff asks the Court to be spared complicity in perpetrating it as a part of his title by estopping him at this time from denying it, and especially from denying that Robago actually, with his own hand, wrote the lines upon it.

3. (Def 'ts brief.) Counsel undertakes to state the rule touching proof of handwriting on ancient instruments. Again, there is a failure to state the exception fully in the form of a proposition. The issue is avoided and must be, to warrant the use of this application as a standard under it. Prescribe the rule and see if the facts are in accord with it—do not distort the rule to fit the facts.

This exception is clearly stated in p. 12 of plaintiff's brief, and is fully supported by defendant's citations.

(1) Where writings are not old enough to prove themselves (1. Gr. Ev., 578. Deft's br., bot. p. 19.) yet, (2) are of such age that living witnesses cannot be had (def 'ts brief, p. 16. *Strother* vs. *Lucas*, 6 Peters, 767), (3) produce other documents proved or admitted his genuine handwriting, or treated and respected by all parties as the genuine handwriting of the person (Def 'ts br., p. 19. Best Ev., 1 Vol., § 240, p. 459), (4) and call experts, &c. (Pl 'tf's br., p. 12, and cases cited.)

This exception has been fully treated in plaintiff's brief, and it only remains to say in answer to plain-

tiff's brief, that plaintiff objected to comparison by the jury, and as no expert, so far as the record shows, was offered it required no objection. The rule is stated fully to show the only way a comparison in case of ancient instruments may be made, and unless so made there is error, and it devolves upon the defendant to show some rule of law admitting this peculiar case.

On p. 21, counsel says in his brief, that in bills 1, 2 and 3, no referance is made to the fact that "a number of living witnesses" testified touching the hand-writing of Rabago's. He is mistaken. Pages 31 and 32 show that the full charge of the court is made parts of those bills, and in it that fact is clearly stated.

Laying aside all else—merely for the sake of this argument — the spirit of the exception is not met as to the proof of this paper. No proof that this paper was in the archives prior to 1881 exists. Witnesses testify to hand-writings on it, but not of Rabago's. *Crow* vs. *Eastman*, 1 Cush, 180, and other cases cited by plaintiff show that opinion evidence of the person's own hand will not establish a standard — how much less such evidence of the hand-writing of others. Such evidence will admit the paper as ancient, and if not denied may admit the signature as genuine if so treated by all parties or admitted to be such.

But whenever this paper is presented the question returns to the disputed handwriting, the collateral issue is raised, and however ancient, difficult and annoying to the defendants, the rule is inexorable that no disputed signature can be used as a standard. (Pltfs. brief, p. 12, 13.)

Defendants say it is impossible for them to get better evidence. (br. p. 21.) Not so. They quote Greenleaf, who says, such comparison cannot be made when the instruments to be supported "are not so old as to prove themselves." (1 Gr. Ev. 578, Defts. br., 19.) Here is their relief, when an instrument is 30 years old, and is properly supported the law furnishes a witness in the form of a presumption of genuineness. Before this, the law allows comparison of hands under restrictions; after this, is given the presumption. Upon doing this much for the old paper, do the defendants ask more? The law proves a paper when it has been acted on as genuine for 30 years, and no comparison is needed. The rule of comparison in ancient instruments is one of necessity, and when obviated by the instrument proving itself, the law gladly discards such evidence, being weak at best.

The ancient standard must be treated as the genuine handwriting by all parties, must have come down the years intervening with the seal of some one's recognition as the handwriting of him, who is now dead. It must be vouched for by some one, either by words, acts or respect, as the supposed *hand* of the person in question. Such is not the case here. The defendants may claim this as an ancient paper and the plaintiff make no objection, though it has been proven to be only a few months older than its introduction into this case, yet this proves nothing as to the color of the ink or the hand which traced the characters, evidencing its contents.

The old power may with some logic be offered to support the application, for it has a purpose to perform, and the defendants have had it since 1876, but

the application has no one to establish its birth earlier than 1881, except by the witnesses, who, by opinion evidence, attempt to prove the writing of Viesca and his secretary, claimed to be upon it. Neither of these papers were ever seen by any living witness earlier than, the first in 1876; the second in 1881. As said in a case, my note to which is in Texas, the expert with pen and dye can so easily convert the new into the seemingly old that evidence of age at least should be proven by positive evidence.

4. (Def'ts br., p. 21.) Counsel here states that the common law always allowed comparison by the jury in aid of other evidence, quoting among others South Carolina, Pennsylvania, and New Hampshire cases. In these States such may be the rule and indeed they seem to allow comparison of hands by the jury in all cases, even with writings not in evidence.

But no such aid is allowed the jury in the English courts, (except by recent act of Parliament), nor in the courts of the United States nor in civil cases in Texas; a glance at his citations impressing the fact that he had found no such authority.

5. (Def'ts br., p. 23.) The plaintiff has carefully tested the authorities on the issue presented, and is forced to believe that the Court must assume and bear the burden of responsibility as to the genuineness of the standard. Herein the trial court has erred. Counsel says this "gave the plaintiff a chance which he was not entitled to, because there was not enough evidence to sustain a verdict against the genuineness of the paper, if that were the only issue before the jury."

The plaintiff asks no chance. He desires the proper tribunal constituted by law to decide a given issue, to decide it. It is not a trial of chances. If the Court construed this paper so clearly proven as to preclude any doubt that Rabago wrote the lines contained on it, it was his duty to relieve the jury of that issue.

How foreign to the law is the statement that there was not "evidence enough to sustain a verdict against" the paper as a standard? The law is, that if there is any dispute the paper will not be received as a standard. The law abhors this collateral issue —this wrangle over the irrelevant form of letters in a paper of no service to either party—which cannot illustrate the main fact. The plaintiff is not forced to disprove the handwriting, but his opponents must select a standard which they have conclusively proven, or he has admitted in open court in such manner that to deny it would be a fraud upon the Court; and unless they find such an admitted writing as a standard, the comparison cannot be made. "When both are doubtful and uncertain, comparison is not only useless as to any certain result, but *clearly dangerous*, and more likely to bewilder than to instruct a jury." (*Depue* vs. *Place*, 7 Pa. St., 428.) "If there is any controversy as to the genuineness of the specimens they are excluded." (*Brannon* vs. *Sanborn*, 25 N. H., 92). The question is one for the judge and not the jury. (*Com.* vs. *Doe*, 15 Mass., 481.)

Second.

Counsel mistakes the plaintiff's assignment, as quoted, on p. 24, of defendant's brief. It is true a

brief of the errors is set out on page p. 3, of plaintiff's brief, but there is no pretence, nor do the rules require that each exception made below shall here be stated. What is contained on p. 3 of plaintiff's brief, may be surplusage, but was there copied for convenience.

The assignment under the rules is made on p. 21 of the brief, and the exceptions as taken in the lower court follow on p.p. 23, 25, &c. There is no vagueness in the exceptions taken below or assigned in the brief.

On p. 24 of their brief, defendants say the validity of this old trunk power was decided by the Supreme Court of Texas, and the question is now

RES ADJUDICATA.

In support of this they cite *Myers* vs. *Ditmar*, 47 Texas 375, wherein Judge Moore, who also rendered the opinion in *Williams* vs. *Conger*, 49 Texas, 582, (upon which they rely as determining this issue), says: "It may therefore be insisted with much force, and no doubt with great weight of authority, that whatever may be thought as to the correctness of the general views formerly entertained by the court or the influence and control which they should have in other cases now coming before us for determination, the rulings in this particular on the former appeal must be regarded as res adjudicata, and equally conclusive and binding upon this court as upon the court below, when before it. This proposition must be admitted to be sustained by the very highest authorty." (Citing cases).

"But," says this judge, "the law as ruled in these cases is unquestionably *contrary* to the practice of this court, and *has never* received its sanction or approval, and at present, at least, we see no reason for its adoption."

The above case cites *White* vs. *Downs*, 40 Texas, 225, where Judge Gray, says:

"But if this is the same case as that formerly before the court, it is a misnomer to call the opinion and *a simple judgment of remand for a new trial res adjudicata*. The opinion delivered may properly control the lower court, and ordinarily should do so, and undoubtedly on the same facts be entitled to great weight on a second appeal to this court. But the opinion or reasoning for the judgment *is no part of it*, and the judgment itself is not final between the parties, and therefore, is not conclusive. This view is illustrated by the history of the case of Layton and Hall, reported in 10 Texas, 57, 16 Texas, 279, and 25 Texas, 204. In the two former opinions a majority of the court held a doctrine on a question of evidence which was decisive of the case, (as in *Williams* vs. *Conger*.) This was unwillingly followed by the District judge who presided on the third trial, and yet on *a third* appeal, that very doctrine was expressly repudiated as erroneous and the cause again remanded. If there was no *res adjudicata* in that cause it is plain there is none in this." (40 Tex., 225.)

This is the rule adopted by the Texas court and when the *first* opinion is delivered, by the organic law of the court, it is not intended as final, and is not res adjudicata nor expected to be so held thereafter.

In the Supreme Court of the United States the rule is well settled, that your Honors' mandate,

when delivered, is conclusive. It is so held, so intended at the time and the judgment is rendered with reference to the final determination of the case. *Clark* vs. *Keith*, 106 U S., 464.

Defendants fall into error by supposing this court will follow, as to the opinion of a Texas court, the rule by which your Honors are guided in considering a second writ here wherein an issue determined on the first writ is sought to be reopened. The second writ will not serve this purpose. But the first writ comes to your Honors bearing a blank page for for your final judgment, and when written this plaintiff may hope to see done, what was not done by the Supreme Court of Texas,—a judgment rendered upon the record.

The Texas court has reserved the right to re-open its own mandate, and delivered the opinion in 49 Texas with that reservation, declared in a line of decision in which is found *Meyers* vs. *Dilmar*, 47 Tex., 375, cited by defendant.

Does defendants' counsel ask this Court to be bound by a ruling which does not bind the State Court by which it was delivered?

I trust the opinion in 49 Texas will be given great weight by your Honors, such weight as will cause it to be carefully read and compared with the record, rather than hastily scanned and laid aside.

For instance, when, on p. 599, the court would charge Rabago with laches—against its own ruling that they did not run in this case—because he did not go from Santa Rosa, Mexico, his home, to Aldrete, who seems to have been at Nacogdoches, in Eastern Texas, to inquire of his land. The record shows Rabago was never in Texas, did not know

where his grant had been located, and would have supposed it located in Bexar, in Western Texas, by a western commissioner, where his concession says it should be rather than by a commissioner living in Eastern Texas, hundreds of miles away, at a time when a Mexican's life in Texas was ever in danger.

Again, in the same sentence it is said Aldrete could have told Rabago that Williams was acting under Blanco—an idle supposition not hinted at in the record—unless the old trunk power is first proven ond its contents then be accepted as true, and not then until we presume S. M. Williams got out the grant under it, *of which no word of evidence is found in the record.*

Again, on p. 597, it is said "the power accompanying his application was not retained by the Commissioner." We do not know. It was customary to attach the power to the title, and certainly it is proper to deliver to some one a power under which an attorney acts, and Williams may have done this, and Aldrete may have kept it, as it is not attached to the title: a more reasonable theory than that the attorney should hold for forty three years a power on which, if genuine, such valuable rights depended. But here all is conjecture with that court and with counsel, and must be with your Honors.

Again, on p. 597, Judge Moore says "Blanco could have procured a copy of the paper. He could, if the steps had been taken to do so—as by having a public instrument, or citing Rabago—but this paper nor the Mexico paper was ever a record, whence a copy could have been taken, and there is no evidence of such copy. If that court refers to a private copy—or a legal copy—Blanco did not act under it

in the city of Mexico, for he says, and his notary Bonilla, certifies, that he acted under an original, which Blanco was careful to retain in his own hands —free from the eyes of honest investigation.

The Texas Court falsifies the record in speaking of Blanco's having a copy—not a word of evidence sustains it. Counsel in his brief attempts to explain what is meant by the notary in speaking of the "original power," and this will be noticed later. (p.).

Then the doctrine of *res adjudicata* does not apply —even to the Texas Court—but if it did, it could not bind your Honors, to whom this non-resident plaintiff respectfully appeals for a hearing upon the record, free from the prejudice of the State courts.

In view of the opinion being mainly a *dictum*, and by the rule as stated in the defendant's authority of *Myers* vs. *Dilmar*, 47 Tex., 375, precluding the idea of *res adjudicata*, this Court will pass upon the merits of the old trunk power, under the exceptions taken below.

The plaintiff's statement, in his brief, page 22, that only three facts are in evidence concerning this paper is not denied, but a search of defendant's review of the facts sustain it. 1. That it was found, after this action was brought, by Kleberg, in Galveston, in 1876, where Judge Williams says he knew it was by tradition since March, 1836. 2. Its endorsements in the handwriting of Blanco and S. M. Williams. 3. Its similarity to the Hammekin copy.

As matter of law, do these facts entitle it to go to the jury as an ancient instrument? It is claimed to be old enough to prove itself, and cuts off the pretended standard for comparison of hands, but is there

any fact freeing *it* from just grounds of suspicion, or is there any act proven to have been done *under it?*

As said by plaintiff in his brief, and quoted in defendant's brief, p. 35, the defendant's vendors have done acts sufficient to prove an ancient instrument, but the latter brief fails to say further, that the evidence shows all of these acts to have been done under a different original power. The plaintiff meets the evidence as he finds it, and accepts it from the defendant's witnesses. He cannot do otherwise. The paper was either not in existence prior to 1876, or it was so strangely and closely kept that it made no history for itself, and all we know is from their side.

And here note a mistake of the witness Hammekin, and defendant's brief, p. 27, (2). Reference is made to *an official certified copy* of the Mexico power shown the notary May 25, 1836. Hammekin says he took a copy of this official copy! Turn to page 37 of the Record. There the notary's certificate is found and shows that on March 17, 1837, he purports to make a copy of *an original power*, "the same that he had before him when making out the bill of sale, that on the 25th day of May, 1836," was made by virtue of it, which bill of sale "appears in the records in his charge." It does not appear that the power was ever a record or paper in his office, and, turning to that bill of sale, Record p. 57, the same notary on May 25, 1836, when he made it, states: "I have seen, read and returned to the party (the power) and to it in his possession I refer." This shows that Hammekin had no official copy, but only such copy as could be made by any private person, who assumed to certify to a writing from memory, examination or

otherwise. There was never an official copy of this paper or the Mexico power.

Pardon one question, why was Blanco so careful to have this paper returned to him? He may be as honest as the defendants' claim, but his name frequently appears in the Texas reports, and we know that many acres of land, public and private, have been acquired by high officials under circumstances, which, if personal property, would give rise to criminal prosecutions.

This Mexico paper was returned to Blanco, its absence is not explained, it could be of no use to him after selling to Laguerenne. When Hammekin asked for a copy why did he not receive the original, it being then less than a year since it had been shown to the notary and returned to Blanco?

If in the record of the notary it should be there now subject to the order of the parties herein, and in fact the pretended successor to that notary has given to the defendants a copy of the Laguerenne deed. (Trans., p. 55, Dep. of Landgrave.) If not in the notary's record, no official certified copy was ever or could ever have been made for Hammekin.

If in the notary's record, a certified copy should be here; if not in the record of the notary Bonilla or Landgrave, then Hammekin and defendant's counsel are using improper terms in misnaming this—an official certified copy.

This presents clearly the weakness in defendants' title. They offer no proof of the old trunk power's genuineness by direct evidence, but rely solely upon it as an ancient instrument, to which please give patient attention.

1. Its improper custody seems so clearly shown by 2 Ph. Ev., p. 369, and the array of evidence and authority cited in plaintiff's brief, p. 26, that reference is made thereto.

2. What do the authorities mean by saying a paper must be free from suspicion?

The law presumes a paper genuine in mercy to its age, and will consent to its validity on slight proof. On the other hand, if its past bears suspicion with it, this must be removed, and how? Not by presumptions, but proof.

State to any mind that the defendants claim under a power which was in Texas, when their deed recites that the power under which it was made was in the City of Mexico, and at once intelligence reaches out for an explanation. Is this suspicion? State to the same mind that the custom of the conveyancers was to attach the power to the paper made under it, (*Hanrick* v. *Barton*, 16 Wallace p. 166.) and that this deed has no such power attached to it, nor has the title from the State to Rabago—and the same intelligence eagerly awaits further light. Is this suspicion? State to the same mind that the defendant's own deed says Blanco took back the power, and this intelligence will demand explanation. State to the same mind that the notary did in some way get this paper from Blanco to make a copy of it, and that though *functus officio*, and useless in Blanco's hands it was not allowed to become a part of the title, and intelligence refuses to accept its genuineness unless explained.

This, however, applies to the city of Mexico paper. The old trunk power must bear, in addition to all

these suspicions, the weight of having slept at least forty years among old miscellaneous papers unknown to its keeper, without an act *proven* to have been done under it to remove suspicions, which any inquiring mind must raise when it becomes aware that from a date, March, 1836, prior to the arising of the adverse title by the Laguerenne deed, on the 25 May, 1836, this paper was among useless documents, the language in which written not being understood by their keeper when found. (Tr. p. 32.)

During all these years no act was done under it, and the splendid array of evidence quoted in defendant's brief refers itself without argument to the city of Mexico paper, three items excepted.

But to offset these three, the endorsement on the paper flourished before the court as Blanco's handwriting, does, in its very terms, "transfer all his powers" thereunder (trans. p. 46), it is true only for the purpose of taking possession. But looking to the history of the paper and after acts attempted to be referred to it, such transfer shows an absolute abandonment of it by Blanco. That was, if true, in 1833, and after remaining in the hands of Williams three years, Blanco purports to act under another original power in Mexico on 25 May, 1836.

This transfer, abandonment and reciting that he acted under another power might not affect this old trunk paper if it were proven by witnesses or notarial acknowledgment, though Judge Story intimates that it would (*Clark* vs. *Courtney*, 5 Pet., 347), yet when the law is that the paper must be freed from all just grounds of suspicion by acts *done under it*, such transfer, recital and abandonment, added to the grave suspicion cast upon it by the acts of Blanco

touching the city of Mexico power, prove that the old trunk power should not be allowed to stand as a precedent for other ancient instruments in the records of our country.

3. The acts done under the City of Mexico power cannot support the old trunk power. *Chowder* vs. *Hopkins*, 10 Paige, 183, (Plf's br. p. 24) beautifully illustrates this case, as does also *Meegan* vs. *Boyle*, 19 Howard, 130, (Plf's. br. p. 24.) The plaintiff, in candor, thinks the acts done by vendors of the defendants are sufficient in general to support an ancient instrument. But this is not our issue. Do they support the old trunk power? If they do, and the Court holds that as matter of law it was not so suspicious as to be withheld from the jury, then this exception is not well taken.

Presuming, however, that the Court will follow *Chowder* vs. *Hopkins* and *Meegan* vs. *Boyle*, it only remains that I call attention to the three facts alone applicable to this old trunk power.

1. Its custody—if held proper—does not alone sustain an ancient instrument, and the fact of its being found in 1876 in the old trunk is "as consistent with the supposition that the deed is a forgery," as "that it is genuine." Plff's. br. p. 24. *Wilson* vs. *Betts*, 4 Denio, 215.

2. The handwriting of Blanco & Sam'l M. Williams is not sufficient to allow it to the jury. The instrument in *Wilson* vs. *Betts* was indorsed "Registered April 28, 1795," and found in the registry, which is a more convincing endorsement than is on this old trunk power. (Plff's. br. p. 25.)

3. Its similarity to the suspicious power which Blanco has concealed from all eyes except Bonilla's —who may have shared the secret—is the fact most damning in all the record to this old trunk power. If Blanco had an honest power, why conceal it? and if dishonest, it casts suspicion upon its counterpart rather than relieves it therefrom; and, moreover, this similarity is not *an act under* the power, which is the requisite we are now considering.

The claim that S. M. Williams took out the title under this power is no longer relied on in defendant's brief, and if they do, the answer comes from a silent record. Here, again, if this power was the authority for his act, Williams should have had it attached to the title. But no power in writing being required, it may be as strongly presumed that this power came too late for that purpose as to presume that this was his authority.

However this may be we know not, but if your Honors hold that this old trunk power is proven by the acts of Samuel May Williams under it, it is asked with great respect that the words of the record be quoted—not presumed—so that the plaintiff may know that his claim is not well founded. This is asked to impress upon your Honors the silence of the record, and in all honesty and respect.

On page 38 of his brief defendant's counsel claims an affirmance *de hors* the record, on the ground that if his old trunk power is not the one, a genuine power will be presumed. He takes this idea from plaintiff's brief, p. 29, where it is said such a presumption is the stronger title. But will this court do violence to the record as it comes from the lower court? Evidently counsel forgets that this case has

passed beyond the jurisdiction of Judge Moore and 49th Texas Reports, where such a step was gravely threatened. How can we know what the record may have contained if the defendants had relied on such a presumption below. The plaintiff would be glad to hear counsel before the lower court upon a presumption of a power whilst the records of that court has been for years burdened with a power under which their pretense of claim has been defended.

The plaintiff will not tax the Court with further answer to this anomalous request to affirm the writ on a presumption not relied on below, if it should become necessary to do so in defendant's behalf, by reason of holding invalid a power upon which they now rely. Such power and reliance themselves rebut the presumption of a power which the lower court might have been called upon to make in the absence of the pretended power itself.

Third.

In answer to IV, proposition of defendant's brief, p. 31.

The defendant's brief (last line, p. 31) states that on page 36 of the record a certain fact "was urged before the jury." Such may have been the case, but *the record* does not so say on page 36, nor marginal page 36. If in other parts of the transcript this appears I do not find it.

The circumstance is mentioned to illustrate the laxity with which the record is regarded, rather than any importance which may attach to its transgression in this instance. Let us be tried by the record.

The error presented by the plaintiff's brief, p. 37, styled fifth assignment, based upon the fifth exception in the record, marginal p. 47, and attempted to be answered under caption IV. p. 31, defendant's brief, is now under consideration. The exceptions are clearly taken to the charge of the court, and the charge refused.

The jury are told Blanco could have had a legal copy of this trunk power in the City of Mexico, and if so, his act under it would have divested title out of Rabago.

To state this as a proposition may or may not be "good law." (Def'ts brief, mid. p. 32.) The idea is first found on page 595 of 49 Texas, but whether the law or not in the abstract, such a holding in this case is stupidity itself, when the defendants' evidence says, on marginal p. 37 of the record, that Blanco had, and acted under, an original power in making the Laguerenne deed.

Defendants say the charge complained of was given by the court to prevent the jury being misled by the plaintiff's argument, "that if both powers were originals to support the one in evidence, the acts shown to have been done by the defendants must refer themselves by proof to this paper. But that this paper, being kept outside of their chain of title, the acts must refer themselves to the City of Mexico power."

The above is not only the plaintiff's argument, but the defendants' evidence, to reconcile which, the court says, that Blanco may have had, in the City of Mexico, "a legal copy" of the old trunk power, and if so, the title passed from Rabago.

This charge with a single span bridged for the de-

fendants a chasm, into whose depths we peer in vain for columns of evidence upon which either to support the bridge thrown across by the court, or any semblance of connected theory advanced by the defendants.

Again, they hold aloft the convenient shield wrought in 49 Texas, and say, this question is also *res adjudicata*. No charge of the State District Court had raised this issue of a legal copy, but Judge Moore, in his solicitude for the defendants' success, coined this counterfeit evidence, and the U. S. Circuit Court below, out of respect to the opinion of the other court, followed their language as if *res adjudicata*.

As said in plaintiff's brief, the only theory presented in the charge of the learned judge below was that Blanco had a "legal copy" of the old trunk power, and in their findings for the defendants the jury crossed the bridge built by the Supreme Court, in 49 Texas. They were not told that if the paper had in the city of Mexico by Blanco was an original, &c., they could find for the defendants, but they are held to the legal copy, and the plaintiff was cast upon an issue not raised by the evidence.

This state of the record is confessed on page 33 of their brief, and the explanation is as cunning as unsupported. They tell us that when their notary says the original was before him, he meant such an original as was made by notaries, taken from the stitched book as described by him on bottom page 6 of their brief. Turning there we find they call the copy—not an original, but—"a certified copy." They are convicted out of the mouth of their own counsel.

But they say that the nomenclature has changed,

and what we call a certified copy was called an original, in Mexico. Yet, in the same paragraph, they say that when so used the copy was called generally the *second* original.

Turning to the authorities cited by them on page 33, as to the meaning of the word "original," the reports show that these were acts passed before an officer who could certify a copy and hand it to the grantee—and not to private letters which never became a record of any officer by whom such copy could be made.

But here again, they ask presumptive relief from their own evidence. Their certificate calls the Mexico power an original, and they have not denied it. Blanco returned it to his own custody, and the plaintiff has no fact upon which to deny its original character—whether forged or not.

Taking the record as we find it the court has charged upon evidence not therein, and against the theory of the defendants, who, on the trial, claimed that Blanco had the identical old trunk power before him in the city of Mexico, and that it "was the identical power under which Blanco acted in making the sale to Laguerenne." (Transcript mar. p. 54, 8th exception top p. 43.)

Nor have they deviated from this theory in this court. Still claiming that the old trunk power was before Blanco, they say Williams "may have rereturned it to Blanco, and the latter may have sent it back to him for some reason after the sale to Laguerenne." But with remarkable candor they also say "the record is silent as to all these matters." (Defts. tr. p. 31.)

As contended by plaintiff their theory below as in this court was that Blanco acted under the old trunk power and not a legal copy ; yet the jury are firmly held to the theory of a legal copy and the court below failed to stultify himself with the absurdity that Williams parted with possession of the paper after "the runaway scrape" in March, 1836. (Rec. 51.)

As to this "sending back theory," if the defendants will say that the old trunk paper was not placed in the trunk in March, 1836, but was sent to Blanco and returned by him to Williams, and "that this old paper was put there by Williams prior to his death in 1858," the plaintiff challenges its age. This case was tried in 1884 and at that time the paper would not have been proven to have been thirty years of age, if only traced to 1858.

The age of the paper has been vaguely proven by a witness three years old when the transaction occurred, but the plaintiff's record does not break down this proof of age, yet if the defendants deny it to have been in the trunk in March, 1836, we are again at sea.

No, in conclusion, this error of the lower court cannot be rectified here. A theory, not relied on by the defendants, has been made the central pivot on which the cause went off below, and in justice to the plaintiff he believes he will receive your Honors mandate for a new trial and such an opinion as will clear his title of the cobwebs of conjecture which have gathered on it since the delivery of the special plea in the defendant's behalf by the Supreme Court of Texas nine years ago.

Fourth.

The alienage of Laguerenne. VIII of defendant's brief p. 38.

The question is raised by the evidence record p. mar. 66, and whilst this court has said that the title may be divested by sale to an alien under Mexican law, it is hoped that the court will consider that in *Clay* vs. *Clay* and *Lacoste* vs. *Odam*, the rule of property was settled to the contrary, based upon the law that the sale was a nullity and did not pass any title—defeasible or otherwise.

As for elementary authority it is abundantly cited in *Holloman* vs. *Peoples*, 1, Texas, to which I trust this court will again refer.

It seems the idea has prevailed that a *denouncement* was the analogous remedy in the Mexican law to *the inquest of office* of the common law.

As to this in *Holliday* vs. *West*, 6 Cal., 525, it is said, citing *Touchard* vs. *West*, 5 Cal., 306, "But we hold that the proceeding (denouncement) only applied to *grants* made by the government and was totally *inapplicable* to the contracts of private individuals."

Blackstone says (in Cooley's edition, published by Callahan & Co., 1872, in U. S. Supreme Court Library) on page 371, "An alien born may purchase lands or other estates; but not for his own use, for the king is thereupon entitled to them," (upon inquest of office.) "Wherefore *by the civil law* such contracts were also *void*, but the prince had no such *forfeiture* thereby—*as with us in England*." The contract was a nullity and no title passed from the grantor.

Here is the source of law, the head waters of our modern jurisprudence, speaking the doctrine of *Clay* vs. *Clay*, and a thousand Morrills in *Barrett* vs. *Kelly*, 31 Texas, 476, who might decide a right accruing in 1833 by the common law which was not adopted in Texas until 1840, cannot blot out the clear, well-established rule of *Clay* vs. *Clay*.

It was the law, that no title passed to Laguerenne, it should be declared the law of this case, and if your Honors will do yourselves the justice to stop for calm investigation, the current of recent decisions must be returned to the true course whence *Barrett* vs. *Kelly* has diverted it. (See plaintiff's brief, p. 48.)

Most respectfully submitted,

EUGENE WILLIAMS,
Of Counsel for Plaintiff in Error.